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In The

Supreme Court of the United States

October Term, 1997

ALBERT HALE, President of the Navajo Nation and THE NAVAJO NATION,

Petitioners,

v.

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council, and THE HOPI TRIBE and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

BRUCE R. GREENE
Counsel of Record
GREENE, MEYER & MCELROY
1007 Pearl Street
Suite 220
Boulder, Colorado 80302
303-442-2021

DALE S. ZEITLIN
JAMES M. BALOGH
1707 East Highland
Suite 190
Phoenix, Arizona 85016
602-234-8905

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Should this Court resolve a circuit conflict as to whether the standards governing admissibility of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) are applicable to all expert testimony and not just expert testimony based upon a "novel scientific theory."

2. Under the 1974 Navajo-Hopi Settlement Act, does the federal government's liability for damages to the Hopi Partitioned Land ("HPL") depend on whether or not the government's failure to perform its legal duty to protect the HPL was unreasonable?

3. Under the 1974 Navajo-Hopi Settlement Act, should the Navajo Nation be liable to the Hopi Tribe for monetary damages to lands in the absence of any proof that the Hopi suffered any monetary loss?

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PETITION FOR A WRIT OF CERTIORARI

The Navajo Nation respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in two cases that were consolidated both for trial and for oral argument on appeal. For convenience, these cases will be referred to as the Damage Case (Appeals 94-17032 and 95-15029, Nos. 76-934 below), and the Use Case (Appeal 94-17022, No. 76-936 below).

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is reported at 118 F.3d 1371 (1997). The opinions of the District Court (App. 34 and 76) are unreported.

By order filed September 17, 1997, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. 112.

JURISDICTION

On January 15, 1993, the U.S. District Court for the District of Arizona issued Findings of Fact and Conclusions of Law and Order in these matters.[1] On October 5, 1994, the U.S. District Court denied the Navajo Nation's

[1] A third case, the Owelty case, was also decided by the district court. However, the Ninth Circuit remanded that case to the district court and the Navajo Nation is not, at this time, petitioning for a writ of certiorari.

timely filed motions to amend the findings of fact and the judgment. Final judgment was entered against the Navajo Nation in the Use Case on October 13, 1994 in the amount of $18,187,132.00 and in the Damage Case on January 15, 1993 in the amount of $3,167,338.84.

On October 31, 1994, the Navajo Nation filed a Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit which, on July 8, 1997, affirmed the Use Case, and affirmed in part and reversed and remanded in part the Damage Case. On September 17, 1997, the Ninth Circuit denied the Navajo Nation's timely filed petition for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1 this Petition has been filed within ninety (90) days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) (1988).

STATUTES INVOLVED IN THIS CASE

The Navajo and Hopi Tribes: Settlement of Rights and Interest, 25 U.S.C. § 640d, et seq.:

25 U.S.C. § 640d-3:

> If the negotiating teams fail to reach full agreement within the time period allowed in section 640d-2(a) of this title or if one or both of the tribes are in default under the provisions of section 640d-1(b) or (d) of this title, the Mediator, within ninety days thereafter, shall prepare and submit to the District Court a report containing his recommendations for the settlement of the interests and rights set out in section

640d(a) of this title which shall be most reasonable and equitable in light of the law and circumstances and consistent with the provisions of this subchapter. Following the District Court's review of the report and recommendations (which are not binding thereon) and any further proceedings which the District Court may schedule, the District Court is authorized to make a final adjudication, including partition of the joint use area, and enter the judgments in the supplemental proceedings in the Healing case.

25 U.S.C. § 640d-5(d):

In any partition of the surface rights to the joint use area, the lands shall, insofar as is practicable, be equal in acreage and quality: *Provided,* That if such partition results in a lesser amount of acreage, or value, or both to one tribe such differential shall be fully and finally compensable to such tribe by the other tribe. The value of the land for the purposes of this subsection shall be based on not less than its value with improvements and its grazing capacity fully restored: *Provided further,* That, in the determination of compensation for any such differential, the Federal Government shall pay any difference between the value of the particular land involved in its existing state and the value of such land in a fully restored state which results from damage to the land which the District Court finds attributable to a failure of the Federal Government to provide protection where such protection is or was required by law or by the demands of the trust relationship.

25 U.S.C. § 640d-17(a):

> Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 640d-2 or 640d-3 of this title:
>
> . . . .
>
> (2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands; and
>
> (3) for the adjudication of any claims that either tribe may have against the other for damages to the lands to which title was quieted as aforesaid by the United States District Court for the District of Arizona in such tribes, share and share alike, subject to the trust title of the United States, without interest, notwithstanding the fact that such tribes are tenants in common of such lands: *Provided*, That the United States may be joined as a party to such an action and, in such case, the provisions of sections 1346(a)(2) and 1505 of Title 28 shall not be applicable to such action.

STATEMENT OF THE CASE

On December 16, 1882, President Chester A. Arthur signed an executive order setting aside a parcel of land which is approximately 55 miles wide and 70 miles long in northeastern Arizona ("1882 Reservation") "for the use and occupancy of the Moqui [Hopis], and such other Indians as the Secretary of the Interior may see fit to settle thereon." *Healing v. Jones*, 210 F. Supp. 125, 129 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (per curiam). Navajo individuals resided on these lands both before and after the 1882 Reservation was created. Over the years, the Nation's occupation of these lands increased as its population increased. The Hopi Tribe contended that it had exclusive use of the 1882 Reservation while the Nation contended that it had exclusive interest in approximately 4/5ths of the 1882 Reservation. *Id.* The dispute between the two tribes festered for years. The many attempts made to resolve the dispute were unsuccessful.

This led to Congress' enactment of legislation in 1958 authorizing the tribal chairmen of the respective tribes to commence or defend an action against each other and any other tribe of Indians claiming any interest in or to the 1882 Reservation to determine the rights and interests of these parties. Subsequently, the Hopi tribal chairman initiated the *Healing v. Jones* litigation. In *Healing v. Jones*, a three judge district court determined that the Hopi Tribe and the Navajo Nation had joint, undivided and equal interests in and to a portion of the 1882 Reservation, known as the Joint Use Area. *Healing v. Jones*, 210 F. Supp. at 189-190. The court also concluded that Congress did not mandate the division of the 1882 Reservation between the two tribes. *Id.*

Although the court in *Healing* decreed that the Joint Use Area was to be shared by both tribes, in reality, the area was occupied almost exclusively by the Navajos who depended on livestock grazing for both their sustenance and livelihood. *Hopi Tribe v. Watt*, 719 F.2d 314 (9th Cir. 1983). The district court found that the land in the Joint Use Area had been in poor condition since the 1930's and had been overgrazed by Navajo livestock. App. 69. The federal government fostered Navajo overgrazing by providing the Navajos with permits for more grazing than the land could reasonably support. App. 3. Due to the overgrazed condition of the Joint Use Area, the Navajos residing on and grazing sheep on the Joint Use Area were only able to "eke out an existence", from an "overgrazed, harsh, and inhospitable area which yields little above a subsistence living". *Hamilton v. MacDonald*, 503 F.2d 1138, 1145 (9th Cir. 1974).

When co-tenancy of the Joint Use Area proved unworkable, Congress passed the Navajo-Hopi Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (codified as 25 U.S.C. §§ 640d to 640d-31 (1988 & Supp. 1993)) to settle the Navajo and Hopi conflict as to the Joint Use Area (the "1974 Settlement Act"). Congress specified that the settlement was to be "equitable". 25 U.S.C. § 640d-3.

Among other things, the 1974 Settlement Act authorized the district court to make a final adjudication including partition of the Joint Use Area. On April 18, 1979 a final judgment of partition was entered by the district court that divided the Joint Use Area into the Navajo Partitioned Lands ("NPL") and the Hopi Partitioned Lands ("HPL"). *See* map of the Joint Use Area.

App. 113. The boundary between the NPL and the HPL did not correspond precisely with the pattern of settlement of the Joint Use Area. Thus, the 1974 Settlement Act authorized relocation of the Hopis and Navajos who ended up on the wrong side of the line. Indeed, the partition ordered by the district court resulted in the relocation of approximately 10,000 Navajo people from their ancestral lands.[2] Navajo-Hopi Land Commission Office, *NAVAJO RELOCATION, A SPECIAL REPORT FROM THE NAVAJO-HOPI LAND COMMISSION OFFICE.*

The 1974 Settlement Act also authorized a number of actions between the Hopi Tribe, the Navajo Nation and the federal government concerning the use and occupancy of the Joint Use Area prior to partition, including the cases addressed in this petition.

A. The Use Case

25 U.S.C. § 640d-17(a)(2) authorized the district court to determine and allow recovery for the "fair value" of one-half the grazing and agricultural use made by individual Navajos of the former Joint Use Area ("JUA") from September 28, 1962, until the land was partitioned on April 17, 1979.

The entire Hopi evidence in regard to "fair value" of the grazing use rested on the testimony of one witness, Dr. John Workman, a range economist, who testified as to the fair market rental value of ranch land in Arizona. Dr.

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[2] Fewer than 20 Hopi individuals were required to relocate from the NPL.

Workman's opinion was based solely upon a published statistical survey of rental rates for a number of unidentified private ranches. Relying on Rules 702 and 703, Fed. R. Evid., the Navajo Nation challenged the admission of Dr. Workman's opinion testimony as to "fair value" because he did not have foundation or competence to testify as to the rental value of ranch land in Arizona, he undertook no investigation whatsoever to ascertain the Arizona ranch market, and the facts and data he relied upon were not of a type reasonably relied upon by experts in evaluating the rental value of ranch land. The district court rejected the Navajo Nation's challenge and adopted Dr. Workman's ranch rental rates to determine fair value of the grazing use.

Relying on this Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and other cases, the Navajo Nation appealed to the Ninth Circuit arguing that Dr. Workman's testimony should not have been admitted by the district court because it did not rest on a reliable foundation, was not derived by a reliable and accepted "scientific method," and did not amount to "good science." The Ninth Circuit rejected the Navajo Nation's *Daubert* based challenge to Dr. Workman's testimony, stating that the Navajo Nation's reliance on *Daubert* was misplaced because Dr. Workman's testimony did not derive from a "novel scientific theory." App. 13.

B. The Damage Case

25 U.S.C. § 640d-17(a)(3) authorized the Hopi to sue the Navajo for damages to the HPL and to join the United States as a party. 25 U.S.C. § 640d-5(d) provides for federal government liability "which results from damage to the land which the District Court finds attributable to a failure of the Federal Government to provide protection where such protection is or was required by law or by the demand of the trust relationship."

At trial, the parties produced uncontroverted evidence that a large portion of the HPL was set aside by the Hopi Tribe as a forest and wildlife reserve, which the Hopi Tribe did not use and never intended to use for grazing livestock. The district court held that the Hopis were not entitled to theoretical or speculative damages for that portion of the land that the Hopis set aside for non-grazing purposes. The district court reasoned as follows:

> This Court is not determining damage to the HPL in the abstract, but is determining the lost grazing opportunity to the Hopi Tribe due to overgrazing by Navajos. Because evidence at trial established that the Hopis have not and will not graze these range units, and hence have not and will not suffer any real injury for a low grazing capacity on that land, this Court will subtract the lost grazing opportunity associated with the seven unused range units.

App. 53.

The circuit court reversed the district court's requirement that the Hopi prove real injury and instead allowed the Hopi to recover for purely theoretical damages. App. 27 The circuit court remanded the district court's decision with respect to these seven unused range units, holding the Navajo Nation liable even though the Hopi *in fact* suffered no injury.

The courts below exonerated the federal government from liability for the government's failure to properly administer the over-grazed land in the HPL. In shielding the federal government from liability, the courts below ignored the plain language of § 640d-5, which did not provide any defenses to federal liability, and instead created out of whole-cloth a defense that conditioned the government liability on whether or not it acted reasonably. The Ninth Circuit stated:

> We agree with the District Court that the government's behavior should be evaluated using reasonableness as the yardstick. . . .

App. 29.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Opinion Directly Conflicts With the Seventh Circuit's Ruling in *Tyus v. Urban Search Management*, The Sixth Circuit's ruling in *Smelser v. Norfolk Southern Ry. Co.*, And Is Contrary To This Court's Decision In *Daubert*.

The Ninth Circuit's ruling that *Daubert* is only applicable to expert testimony based on "novel scientific theory" is in direct conflict with the Seventh Circuit's

decisions in *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996), *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183 (7th Cir. 1993), and the Sixth Circuit's decision in *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299 (6th Cir. 1997). The Tenth Circuit, however, like the Ninth Circuit, limits application of *Daubert* to expert testimony involving "novel scientific theories or methodologies". *See, Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996).[3] Certiorari is appropriate to resolve "sharp divisions among the courts regarding the proper standard for the admission of expert testimony." *Daubert*, 506 U.S. at 581.

The Seventh Circuit in *Tyus* held that the standards governing admissibility of scientific expert testimony announced by this Court in *Daubert* are not limited to testimony based on novel scientific theories or methodologies, but apply to "all kinds of expert testimony".[4] 102 F.3d at 263. The expert testimony in question in *Tyus* involved unscientific testimony concerning the history and patterns of housing discrimination from a professor of sociology and testimony concerning the effect of an advertising campaign on African-Americans from a psychologist. The court reasoned that the *Daubert* standards apply to this type of expert testimony because all expert testimony admitted under Rule 702, "must be tested to be

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[3] The Ninth Circuit has now specifically adopted the Tenth Circuit's reasoning in *Compton v. Subaru* in *McKendall v. Crown Control, Corp.*, 1997 WL 448265 (9th Cir. 1997).

[4] In doing so, the Seventh Circuit specifically rejected the approach taken by the Tenth Circuit in *Compton v. Subaru*, 102 F.3d at 263.

sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in [her] professional work." *Id.*

The Sixth Circuit also applies the *Daubert* standards to all expert opinion evidence and not just that based on novel scientific theory. *See, Smelser v. Norfolk,* where in response to appellant's challenge to opinion testimony from an biomechanical engineer as to causation and defect, the Sixth Circuit held that the Supreme Court "clarified" that under Fed. R. Evid. 702 the trial court "must use a two-step inquiry which examines the expert's opinion testimony for reliability and relevance." 105 F.3d at 303.

The application of the *Daubert* standards to all expert testimony and not just that based on novel scientific theory is consistent with the underlying reasoning found in this Court's decision in *Daubert.* The underpinning for this Court's decision in *Daubert* was Rule 702 itself. *Daubert,* 509 U.S. at 590 ("The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify."). Rule 702 is not limited to scientific knowledge, but also applies to "technical, or other specialized knowledge." Fed. R. Evid. 702. Although this Court limited its discussion in *Daubert* to scientific evidence "because that is the nature of the expertise offered here", the Court's reasoning was broadly based on Rule 702. *Id.* at n. 8. The same factors are applicable to nonscientific expert testimony as to scientific testimony. Is the proposed testimony reliable and relevant? *Tyus,* 102 F.3d at 263.

In *Frymire*, the Seventh Circuit overturned a jury verdict in the district court, in part because the district judge allowed an expert accountant to testify as to the market value of certain real estate investments on the basis of a methodology that other experts in valuation do not use. 2 F.3d at 186-187. Relying on *Daubert*, the Court stated that a "trial judge must ensure that any and all [expert] testimony or evidence admitted is not only relevant but reliable" and that the "Federal Rules of Evidence require a judge to undertake a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid or whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* Since the accountant had not employed a methodology that experts in valuation deemed essential, the Court held that the district court "could not properly have admitted [the accountant's] valuation" opinion. *Id.*

Had the Ninth Circuit or the district court applied the *Daubert* standards to Dr. Workman's valuation testimony in the Use Case, it should have reached the same conclusion as the Court did in *Frymire*. In testifying as to value, Dr. Workman relied on a methodology that experts in valuation specifically do not rely on – published surveys. Both the Navajo Nation's valuation expert and the Hopi Tribe's own valuation expert (who testified in the Owelty Case) testified that it is not an appropriate valuation methodology to rely on published statistical information to establish rental rates. Since Dr. Workman employed a methodology that experts in valuation deem invalid and unreliable, the district court should not have admitted Dr. Workman's valuation opinion into evidence.

Even further, Dr. Workman did not meet the barest foundation requirements to allow him to testify as to rental value in the area of the subject property. Dr. Workman admitted that he had no knowledge or familiarity with the northern Arizona market for ranch rental rates, or as to any of the actual leases or ranches included in the statistical survey, or whether those ranches or rental rates were comparable to the grazing value of the lands being evaluated in this case.

If an expert valuation witness is not familiar with the market value of similar property in the same area, that expert has not satisfied the minimum foundational test to admit his opinion testimony as to value. *See, United States v. Johnson*, 285 F.2d 35, 41 (9th Cir. 1960) ("A real estate appraiser, no matter how well qualified he may be in general, therefore, is not an expert on the value of property which is unknown to him."); 5 Nichols, *The Law of Eminent Domain* § 23.97 (1991) ("to give an opinion of value in an eminent domain proceeding, a person who supposedly has expertise and skill as an appraiser must, in addition to such general knowledge, be acquainted with the values in the vicinity of the land in controversy"); and *Playa de Flor Land and Improvement Company v. U.S.*, 70 F.Supp. 281, 364 (D.C.Z. 1945) ("A witness must be familiar with the market value of similar lands in the same neighborhood and should be acquainted with the property involved in the suit and should possess special knowledge regarding the particularity of any question that would enable him to form an intelligent and fairly accurate estimate of the actual market value of the land sought to be condemned.").

The Ninth Circuit erred in ruling that the *Daubert* standards do not apply to the expert testimony of Dr. Workman in this case and in not overturning the district court's failure to evaluate Dr. Workman's expert opinion testimony in light of the *Daubert* standards. The decisions of the Sixth and Seventh Circuits as to the applicability of *Daubert* are directly in conflict with the decisions of the Ninth and Tenth Circuits and create conflicting results on virtually identical facts. In *Frymire* the valuation opinion testimony was excluded; in the instant case, it was not.

II. The Ninth Circuit's Finding of Monetary Damages in the Absence of Any Actual Monetary Loss Suffered by the Hopi Conflicts with the 1974 Settlement Act and Has Resulted in a Gross Miscarriage of Justice.

In the Damage Case, the district court found that overgrazing on the HPL had temporarily damaged the HPL's capacity to graze cattle or sheep. Although the land was damaged, the court found that the land would recover over time. During the recovery period, the land was capable of being used for some grazing, just not to its maximum grazing capacity. However, the district court also found that the Hopi had set aside a significant portion of the HPL to be preserved in its natural state, as non-grazing land. App. 52. The district court, therefore, held that since the Hopi did not intend to graze any livestock on that portion of the land, it suffered no real monetary injury and would be awarded no compensation for that portion of the unused land. App. 53.

The Ninth Circuit reversed the district court, and remanded this part of the Damage Case to the district

court to assess monetary damages against the Navajo Nation in favor of the Hopi Tribe even though the Hopi suffered no actual damage as to the portion of the HPL set aside for non-grazing purposes.

The Ninth Circuit created a "lost opportunity" concept, not found in the 1974 Settlement Act, and held that, "the Hopi should be awarded damages for lost grazing opportunity on the vacant ranges . . . even though the owner [Hopi] in fact suffered no harm through the deprivation". App. 26-27.

Under § 640d-3 of the 1974 Settlement Act, the courts are required to settle this matter on principles of *equity*. Congress sought to achieve a "fair and equitable arrangement that will settle the argument over this land." 120 Cong. Rec. H. 16785 (Statement of Rep. Regula); 120 Cong. Rec. H. 16787 (Statement of Rep. Lujan).

There is no equitable or statutory interpretation which supports paying windfall damages to the Hopi who suffered no actual injury. The district court's decision should be reinstated.

III. The Lower Courts' Creation of a "Reasonableness" Test to Exonerate the Federal Government from Liability Contradicts the Plain Language of the Settlement Act and Congress' Recognition of Federal Culpability in its Failure to Properly Administer the Lands.

The courts below exonerated the United States from liability for damages to the land by requiring that the parties prove that the United States acted unreasonably.

The plain language of 640d-5, however, requires the finding of federal liability for the difference in the grazing capacity of the land from its existing state to its fully restored state if the United States did not provide protection to the land where protection was required by law or by its trust duty.

Nothing in the 1974 Settlement Act conditions the government's liability on proof of unreasonable conduct. The parties bore only the burden to prove that the government failed to provide protection where it was required to do so by law or trust duty. The reasonableness or unreasonableness of its failure to act is simply irrelevant. Congress recognized, when it passed the 1974 Settlement Act, that the federal government had failed to properly administer the lands. Congress clearly intended that the 1974 Settlement Act would impose strict liability on the federal government.

"The Federal Government had caused the hardship to both the Navajo Nation and the Hopi Tribe by its failure to act in the last 50 years causing very real human problems." 120 Cong. Rec. H. 16788 (1974) (Statement of Rep. Owens).

> The only reason this problem exists is because the failure of the Bureau of Indian Affairs to act; the failure of the Congress to act and the failure of the federal judiciary to be specific. In short, the entire federal establishment has created a situation. Therefore, it is a Federal responsibility.

Id. at 16786 (Statement by Rep. Steiger). The "major cost of the solution should properly be borne by the United

States." H. Rep. No. 93-909, 93rd Cong. 2nd Sess. (1974), p. 9.

A. The United States Is Required By Statute to Prevent Range Damage.

The federal government has been under a legal obligation since 1934 to protect Indian lands from overgrazing. The Secretary of the Interior is required to:

> make rules and regulations . . . to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

25 U.S.C. § 466.

Since 1934, when this law was enacted, the government has had a clear duty to limit grazing on Indian lands to the actual carrying capacity, and to "protect the range from deterioration."[5]

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[5] In fact, the Federal government fostered and encouraged the expansion of Navajo grazing. In 1868, the United States supplied the Navajos with 30,000 sheep and 2,000 goats. Muck, Lee, U.S. Department of Interior, Survey of the Range Resources and Livestock Economy of the Navajo Indian Reservation, pp. 5, 6 (Exhibit 184 below). The United States encouraged the Navajos to expand their herds. By 1881, the United States estimated that the Navajos were grazing "1 million sheep, 400,000 goats, 500 cattle, 600,000 horses, 500 mules and 100 burros." *Id.*

The Commissioner of Indian Affairs, with the approval of the Secretary of the Interior adopted regulations governing the grazing capacity and management of the Navajo range. *Id.* These regulations established "land management districts" which included all of the 1882 Reservation (JUA) from at least 1936. *Healing*, 210 F.Supp. at 158. Pursuant to these grazing regulations, the United States issued grazing permits to individual Navajos which allowed them to graze animals on the JUA from at least 1940.

The Secretary promulgated new regulations applicable to the JUA on December 24, 1957. 25 C.F.R. Part 167 et seq. (formerly known as 25 C.F.R. Part 152). The regulations expressly provided that no grazing fees would be charged to Navajos for these permits. 25 C.F.R. Part 167.12.

Throughout this time period, the United States excluded the Hopi tribe from grazing within the JUA. *Healing*, 210 F.Supp. at 171-172.

The United States' practice of exclusively granting grazing permits to individual Navajos to graze the JUA continued until September, 1969, when the Secretary explicitly removed the JUA from the Navajo grazing regulations. 25 C.F.R. Part 167.4 (34 F.R. 14599, Sept. 19, 1969). Nevertheless, all grazing permits previously issued under the authority of the United States remained in effect until they were cancelled by court order on October 14, 1973. *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 400 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977). The Secretary did not adopt new grazing regulations for the JUA until

April 26, 1977 (redesignated as 25 C.F.R. Part 168, which regulations were amended in 1980).

The grazing permits issued by the United States to individual Navajos on the JUA exceeded the grazing capacity of the land. As a consequence of the United States' policy of issuing grazing permits and allowing Navajo individuals to graze animals in excess of the grazing capacity of the land from at least 1936, by 1961 the lands in the JUA were already severely overgrazed and damaged. App. 3, App. 69.

The federal government has known since the 1930s that the Navajo livestock were overgrazing the range in the area that later became the HPL, but did not take effective measures to reduce livestock to safe levels until the late 1970s. *Sekaquaptewa v. MacDonald*. The United States failed to limit grazing permits to the carrying capacity of the land, failed to remove excess livestock, and failed to comply with court orders directing it to do so. The condition of the range, according to the federal government's own figures, deteriorated further between 1963 and 1973.

Because of the BIA's failure to regulate grazing, the 1974 Settlement Act specifically directed the Secretary of the Interior to "immediately commence reduction . . . of the livestock . . . within the joint use area . . . to carrying capacity." 25 U.S.C. § 640d-18.

Thus, the United States had an obligation pursuant to law to protect the range, it failed to protect the range,

Congress recognized the Federal Government's failure, and its liability was clearly established under § 640d-5.[6]

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[6] In addition to applying the wrong standard to the federal government's liability under 640d-5(d), the courts below sidestepped the district court's previous finding that the land was damaged due to the federal government's neglect:

> 25. As of 1968, the range in the Joint Use Area was overstocked to the extent of 400% of its carrying capacity and it is in a poorer condition now.
>
> 26. Since September 28, 1968, the Navajo Tribe has damaged and misused the Joint Use Area by over grazing and *the defendant United States of America has failed and neglected to take any action to control such misuse.*

Findings of Fact, Conclusions of Law and Judgment and Order on Citation for Contempt (D. Ariz. May 29, 1974) (affirmed *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974). Under the principles of res judicata, law of the case and collateral estoppel, the courts below were bound by the findings which established government liability.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

BRUCE R. GREENE
Counsel of Record
GREENE, MEYER & MCELROY
1007 Pearl Street
Suite 220
Boulder, Colorado 80302
303-442-2021

DALE S. ZEITLIN
JAMES M. BALOGH
1707 East Highland
Suite 190
Phoenix, Arizona 85016
602-234-8905

Counsel for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe, *Plaintiff-Appellee,* v. ALBERT HALE, President of the Navajo Nation; NAVAJO NATION, *Defendants-Appellants.*	No. 94-17022 D.C. No. CV-76-00936-EHC OPINION
FERRELL SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, *Plaintiff-Appellant-Cross-Appellee,* v. ALBERT HALE, President of the Navajo Nation; NAVAJO NATION; UNITED STATES OF AMERICA, *Defendants-Appellees-Cross-Appellants.*	Nos. 94-17031 95-15015 D.C. No. CV-58-00579-EHC

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, *Plaintiff-Appellee-Cross-Appellant,* v. ALBERT HALE, President of the Navajo Nation; NAVAJO NATION; UNITED STATES OF AMERICA, *Defendants-Appellants-Cross-Appellees.*	Nos. 94-17032 95-15029 D.C. No. CV-58-00579-EHC

Appeals from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
October 17, 1995 – San Francisco, California

Filed July 8, 1997

Before: Mary M. Schroeder, Betty B. Fletcher, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Schroeder; Partial Concurrence and Partial Dissent by Judge Fletcher

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COUNSEL

Tim Atkeson, Arnold & Porter, Denver, Colorado, for appellant Hopi Tribe.

James M. Balogh and Dale S. Zeitlin, Zeitlin & Balogh, Phoenix, Arizona, for appellees Hale and Navajo Tribe.

Lois J. Schiffer and Katherine W. Hazard, Assistant Attorneys General, United States Department of Justice, Washington, D.C., for intervenor United States.

OPINION

SCHROEDER, Circuit Judge:

I. INTRODUCTION

These appeals are part of the long running and emotion scarring controversy between the Navajo Nation and the Hopi Tribe, in which the legislative, executive and judicial branches of the United States have all figured prominently. The dispute has centered on the ownership, control and use of nearly 2 million acres of the Native American reservation land occupying the northeast portion of Arizona and neighboring portions of Utah and New Mexico.

These particular cases arise out of specific remedial provisions of the Navajo-Hopi Settlement Act of 1974, 25 U.S.C. § 640d, *et seq.* (1980) (the "Settlement Act"). The Settlement Act allows partition of reservation land that the courts had declared jointly shared by both tribes, but which had been used for grazing exclusively, and excessively, by the Navajo. The Navajo overgrazing was fostered, in large part, by the Department of Interior, which refused to grant the Hopi grazing permits while simultaneously providing the Navajo with permits for more grazing than the land could reasonably support. *Hamilton v. MacDonald*, 503 F.2d 1138, 1146 n.10 (9th Cir. 1974) (explicitly affirming the district court's factual findings regarding the government's responsibility for Navajo

overgrazing). In the 1974 Act, Congress expressly authorized litigation between the Hopi and the Navajo for enumerated damages; Congress intended for money to leaven the land-related inequalities between the Hopi and the Navajo.

The background of this litigation has been recited in nearly 35 years of court decisions and in numerous books and periodicals.[1] We provide only a summary here.

In 1882, President Chester Arthur by executive order created a 2.5 million acre reservation for the Hopi and "such other Indians as the Secretary of Interior saw fit to settle thereon." Exec. Order of Dec. 16, 1882, *reprinted in*, *Healing v. Jones*, 210 F.Supp. 125, 129 n.1 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963). Under this executive order, the Hopi Tribe enjoyed the right to use and occupy the entire reservation. By contrast, the Navajo who had already settled in the reservation did not gain any immediate rights to the land. Nevertheless, the Navajo continued to use and occupy parts of the 1882 reservation. By 1900, the Navajo population had increased to 1,826. *Healing*, 210 F.Supp. at 145. In 1920, it reached approximately 2,600, and by 1958, it exceeded 8,800. *Id.* Despite the Navajo's continued use of the reservation, their right to use the

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[1] *See, e.g.*, Emily Benedek, *The Wind Won't Know Me: A History of the Navajo-Hopi Land Dispute* (1992); Jerry Kammer, *The Second Long Walk: The Navajo-Hopi Land Dispute* (1980); Charles Miller, *The Navajo Hopi Relocation and the First Amendment Free Exercise Clause*, 23 U.C.S.F. L. Rev. 97 (Fall, 1988); *Healing v. Jones*, 210 F.Supp. 125, 129 n.1 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir.), *cert. denied*, 116 S.Ct. 337 (1995); *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974).

land during this period was unclear, and this caused an ongoing and bitter dispute.

In 1958, Congress authorized litigation to settle title to the 1882 reservation. *Id.* at 130. A three-judge district court thus examined the question in *Healing* and found that the Navajo had no right to use the land until 1931, when the Interior Secretary impliedly exercised his authority under the executive order to "settle" the Navajo on the reservation. *Id.* at 157. The *Healing* court further observed that all Navajo who immigrated to the reservation between 1931 and 1958 were also impliedly "settled" in the reservation. *Id.* at 169. *Healing* held that the Hopi occupied the area known as "land district 6" exclusively, but that the two Tribes held a joint, undivided and equal interest in the remainder, known as the Joint Use Area (JUA). *Id.* District 6 is 600,000 acres. The JUA is greater than 1.8 million acres.

Unfortunately, the 1962 order did not resolve the dispute. Between 1962 and 1972, the federal government continued to grant grazing permits to the Navajo, while rejecting all Hopi applications. *Hamilton,* 503 F.2d at 1146 n.10. At the same time, the Navajo intimidated the Hopi and mutilated their cattle. *Id.* Together, the federal government and the Navajo excluded the Hopi from what *Healing* had declared a "joint use area."

The Hopi thus brought a supplemental action in which they obtained an order of compliance and a writ of assistance enforcing the *Healing* decision. Our decision affirming the order and the writ, *Hamilton,* 503 F.2d 1138, documents in greater detail the exclusion of the Hopi from the JUA. In *Hamilton,* we noted that although the

permits enabled the Navajo only to eke out an existence, terrible and destructive overgrazing occurred nonetheless; the carrying capacity of the range was simply insufficient. *Id.* at 1145 (JUA is "an over-grazed, harsh and inhospitable area which yields little above a subsistence living").

The *Hamilton* order required the Navajo to, among other things, reduce its livestock and to allow the Hopi to share the land. *Id.* at 1142 n.2. It also required the federal government to cancel all grazing permits and issue new ones, without giving either the Hopi or the Navajo permits for more than their half of the land's carrying capacity. *Id.* Additionally, the order required the government to adopt a plan to achieve the broad goals of the compliance order, including restoration of the range, within 90 days. *Id.* Both the government and the Navajo failed to do as ordered. In 1974, the Navajo were held in contempt of court. *Sekaquaptewa v. MacDonald*, No. Civ. 579 PCT (JAW) (D. Ariz. May 29, 1974), *aff'd*, 544 F.2d 396 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977). At that time, the Navajo's livestock exceeded, by approximately seven times, the JUA's carrying capacity. *Id.* at 3-4.

Against this background, Congress in 1974 passed the Settlement Act, authorizing partition by court order in the event mediation failed, which it did. A court order of partition was entered, and after appeal and remand, *see Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978), was reconfirmed.

The Settlement Act itself called for partition to achieve as equal a division as was practicable, 25 U.S.C. § 640d-5(d), while at the same time expressly directing

that population centers should not be divided, 25 U.S.C. § 640d-5(b). The legislation also called for measuring the value of the land, for purposes of division, as if the grazing capacity were restored. 25 U.S.C. § 640d-5(d). In an effort to adjust any imbalance that might result from an unequal division, and to compensate the Hopi for both past exclusion from grazing the land and damage done to the land by Navajo overgrazing, Congress authorized several actions for money damages. So that the Hopi and the Navajo could sue one another and join the United States as a party, Congress waived immunity for all three sovereigns. 25 U.S.C. § 640d-5.

In *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir.) (the "rent case"), *cert. denied*, 116 S.Ct. 337 (1995), we affirmed a judgment awarding the Hopi rent, pursuant to § 640d-15(a) of the Settlement Act, for the post-partition presence of Navajo homesites on the Hopi half of the partitioned land. We also remanded the Hopi's award of rent for the post-partition (1979 to 1984) grazing of Navajo cattle and sheep on the Hopi half of the partitioned land, so that the district court could review the merits of the Navajo challenge to the award.

We now have three Settlement Act cases before us on appeal. We review first a judgment entered in favor of the Hopi, pursuant to § 640d-17(a)(2), for the "fair value of the grazing and agricultural use" by the Navajo of the Hopi's one-half interest in the JUA from 1962 to 1979; this is known as the "use case." The second appeal, known as the "owelty case", arises under § 640d-5(d), in which Congress authorized an action for the difference in value between the land awarded to the Hopi Tribe (the HPL) and the land awarded to the Navajo Nation (the NPL). The district court ruled the division was roughly equal

and entered judgment denying any relief. In the third appeal, we consider an action pursuant to § 640d-17(a)(3) by the Hopi against both the United States and the Navajo to recover damage to the JUA caused prior to partition (the "damage case"). In the damage case, the district court entered judgment against the Navajo but refused to hold the federal government liable, finding that the United States had not acted unreasonably in its efforts to protect the JUA from damage.

The Navajo appeal the judgment in the use case and the Navajo and the Hopi both appeal the judgments in the owelty and damages cases. We affirm the use case in its entirety, and in large part, we affirm the owelty and damages cases as well. We discuss each case separately.

II. THE USE CASE, No. 94-17022

A. Background

The district court awarded the Hopi $18,187,132 for the Navajo's combined grazing and agricultural use of the Tribe's one-half interest in the JUA from 1962 to 1979. The case was litigated pursuant to 25 U.S.C. § 640d-17(a)(2), which allowed the Hopi to recover one-half the "fair value of the [Navajo] grazing and agricultural use" between the time of the JUA's creation (*Healing* decision of September 28, 1962) and the partition of the JUA on April 18, 1979.[2]

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[2] § 640d-17. Actions for accounting, fair value of grazing, and claims for damages to land

(a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages,

In this appeal, the Navajo's principal contention is that the Settlement Act itself is unconstitutional because it divests the Navajo of a vested property right to graze animals on the entire JUA. Additionally, the Navajo, for the first time on appeal, contend that the district court lacked jurisdiction because the determination of the fair value in this case constitutes a non-justiciable political question. The Navajo also challenge several evidentiary rulings and factual findings concerning the valuation of their grazing and agricultural use. We affirm the judgment.

B. Constitutional Challenges

Relying on the due process clause of the Fifth Amendment, the Navajo argue that the Settlement Act undermines their property rights, as secured by the judgment in *Healing*. The Navajo also suggest that the statute

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clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 640d-2 or 640d-3 of this title:

. . .

(2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands . . .

is a retroactive impairment of their rights under the Contracts Clause of Article I. Whether the statute is constitutional is a question of law reviewed *de novo*, and as we have recently said, a court should invalidate a statutory provision "only for the most compelling reasons." *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993) (internal quotations omitted).

The common flaw in all of the Navajo's constitutional arguments is that the Navajo never had, either by court decree or contractual promise, an unfettered right to use the JUA to the exclusion of the Hopi. Rather, the *Healing* decision granted the Hopi and the Navajo joint and undivided interests in the JUA. Therefore the statute is a legitimate effort by Congress to implement the *Healing* decree, and to rectify wrongful conduct that has occurred in the wake of *Healing*.

The Navajo next argue, for the first time on appeal, that the district court lacks jurisdiction to determine the "fair value" of "grazing and agricultural use" because this is a non-justiciable political question. Assuming the Navajo did not waive the political question issue, their contention is without merit. The Navajo position boils down to an assertion that the determination of "fair value" is not an issue that courts are capable of resolving. *See Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962) (issue may be a non-justiciable political question if it lacks judicially discoverable and manageable standards for resolution). The Navajo, however, recognize that courts frequently address the concept of "fair market value." *See, e.g., Eales v. Environmental Lifestyles, Inc.*, 958 F.2d 876, 880 (9th Cir. 1992) (calculating "fair market value" of architectural plans); *cert. denied*, 113 S.Ct. 605

(1992), *Doherty v. C.I.R.*, 16 F.3d 338 (9th Cir. 1994) (calculating "fair market value" of painting); *Seravalli v. U.S.*, 845 F.2d 1571 (Fed. Cir. 1988) (estimating "fair market value" of real property). We see no material difference between evaluating "fair value," as set forth in the Settlement Act, and evaluating "fair market value," the more common standard. *See also Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("damage actions are particularly judicially manageable"), *cert. denied*, 508 U.S. 960 (1993).

For similar reasons, we are not swayed by the argument that the "fair value" determination is non-justiciable because it calls for a "policy determination of a kind clearly for non-judicial discretion." *See Baker*, 369 U.S. at 217, 82 S.Ct. at 710. Congress already made the policy decision that the Navajo should compensate the Hopi for excluding them from the JUA. What Congress left for the courts, calculating "fair value," is within the expertise of the judiciary.

Finally, the Navajo, again citing *Baker*, maintain that "the determination [of fair value] is impossible without expressing a lack of 'respect' due" the Executive Branch because the Secretary of the Interior decided not to charge the Navajo for grazing privileges. This argument is misplaced. As the Hopi point out, there is no indication that the Executive Branch ever took the position that the Navajo need not pay the Hopi for their extraordinary overgrazing of the JUA. The Executive Branch's decision that the Navajo need not pay the federal government for grazing permits is consistent with the Congressional

mandate that the Navajo compensate the Hopi for overgrazing. In sum, we reject each of the Navajo's constitutional challenges.

C. Evidentiary challenges to expert testimony

The Navajo contest the district court's admission of Hopi expert Dr. John Workman's testimony regarding the fair value of Navajo grazing (as opposed to agricultural growth) on the JUA. They argue that Workman lacked sufficient foundation to support his testimony, since he is not a real estate appraiser but an economist. They further contend that his methodology did not satisfy the test for expert scientific testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993). We review a decision to admit expert testimony for abuse of discretion. *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 480 (9th Cir. 1991). "A trial court has broad discretion to admit and exclude expert testimony [under Fed. R. Evid. 702] and its decision will be sustained unless it is 'manifestly erroneous.' " *Id.* (citation omitted).

The court was well within its discretion to conclude that Dr. Workman is qualified to offer an opinion regarding the fair value of Navajo grazing. Dr. Workman has been a professor of range economics for twenty-five years, teaching courses in "rangeland appraisal" and "range economic analysis." He has written a textbook on range economics and dozens of peer-reviewed publications on subjects related to his testimony. He has been qualified as an expert on range economics in a case where he gave similar valuation testimony. *See White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 665-66 (1987)

(qualifying Dr. Workman as "an expert in appraisal and range management" and characterizing his proposed measure of damages as "especially persuasive"), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 1538 (1994).

The district court thoughtfully examined the methodology and opinion of each expert, and accepted Dr. Workman's measure of damages only after making appropriate downward adjustments. The Navajo's reliance on *Daubert* is misplaced because Dr. Workman's testimony derives from his relatively straightforward application of range economics, rather than on a novel scientific theory. *See Dang Vang*, 944 F.2d at 482.

The Navajo also challenge the district court's decision to admit testimony from Hopi expert Robert Francy, an appraiser, on the value of corn grown on the JUA. Francy formulated his opinion from what others told him about corn prices. The Navajo argue that this constituted an improper use of inadmissible hearsay. However, the Navajo failed to raise any timely, specific hearsay objection to the expert's testimony and thus waived their right to assign error on appeal. *See* Fed. R. Evid. 103. The record, moreover, reveals that no statements from third parties were admitted for their truth. The third party statements only provided the Hopi expert with background information about corn sales, from which he fashioned his testimony. Such reliance is permissible, since experts in the field, i.e. appraisers, regularly go to third parties for sales figures, as the Hopi expert did here. *See* Fed. R. Evid. 703.

D. Challenges to the district court's valuation calculations

The district court separately valued Navajo "agricultural" use and "grazing" use, as contemplated by the statute. 25 U.S.C. § 640d-17(a)(2). The Navajo challenge the agricultural use valuation on two grounds. First, they argue that the district court clearly erred when it adopted Hopi expert Robert Francy's conclusion that the Navajo had actually farmed the JUA between 1962 and 1979. They contend that Francy's conclusion was based only on speculation. However, the record shows that Francy's conclusion was premised on two reports from the Bureau of Indian Affairs (BIA), aerial photographs, maps, documents, and personal spot checks. The court did not clearly err. Second, the Navajo contend that there was insufficient evidence to support a finding that there was a commercial market for the approximately 200,000 pounds per year of corn attributable to Navajo farming. This argument, however, spuriously assumes that the corn consumed by the Navajo themselves lacks value. The evidence clearly established that the market for most of the corn was in the nature of personal consumption, and only a small percentage of the crops were sold commercially. Thus, the evidence supported a finding that there was a market for the corn.

The Navajo challenge to the district court's calculation of the value of Navajo grazing on the JUA is slightly more complicated than their other contentions, but no more valid. First, the Navajo contend that the value of their grazing on the JUA should be computed from the land's carrying capacity, i.e., the amount of grazing the

land can sustain without irreparable damage. This is how ranch land is typically valued for leasing purposes. Because longtime Navajo overgrazing drastically decreased the carrying capacity of the JUA, the rental value of the land between 1962 and 1979 was only one-fifth the typical rate in Arizona. The district court thus rejected the Navajo's approach and estimated the actual amount of grazing from the number of Navajo animals on the JUA. At times, actual grazing by Navajo livestock exceeded the carrying capacity by approximately sevenfold. The district court then valued the Navajo's use of the land by reference to the actual amount of Navajo grazing. The Navajo argue that in so doing, the district court improperly charged them more than they would have paid on the open market, as the open market rate is pegged to carrying capacity, a lower figure. As the Hopi point out, consumption beyond the carrying capacity should exact a premium charge. The district court did not clearly err when it charged the Navajo for this excessive use.

Second, the Navajo argue that the court overestimated the number of animals on the JUA. The district court counted the number of animals in units of cattle. For most years, the court converted sheep to cattle using a ratio of five sheep per one head of cattle, and adjusted downward for low animal weight. The court did not make these adjustments for 1966, 1968 through 1971 and 1974, because it lacked information about the number of sheep and the weight of cattle on the range. The Navajo contend that the district court should have made the 5:1 conversion and the weight adjustment during these years

because it had sufficient information. The record, however, reveals that the court did not have precise sheep counts during those years, and therefore could not make an accurate conversion. In addition, the court had information on only three cattle sales for those years, and therefore could not accurately adjust downward for low animal weight. The court's estimates of the number of animals on the JUA were not clearly erroneous.

Third, the Navajo argue that the district court erroneously valued grazing by using adjusted private Arizona lease rates instead of federal land lease rates. There were, however, no federal rates between 1962 and 1972; therefore, rates for those years could be estimated only through statistical projections. Moreover, federal rates reflect policy decisions, not market dynamics. The district court's use of private Arizona rates was not clearly erroneous. We affirm the district court's award to the Hopi in the use case.

III. THE OWELTY CASE, Appeal Nos. 94-17031, 95-15015

A. Background

Owelty is a sum of money paid by one former joint tenant to another after a partition results in an unequal division of their land; the owelty compensates the former tenant who received the lesser value for the disparity. *See* Black's Law Dictionary (4th Ed.); 68 C.J.S. *Partition* § 142 at 232-3 (1950 & 1988 Supp.); 59A Am.Jur.2d *Partition* §§ 2, 253 (1987). In this owelty case, the district court held that after partition there was no statistically meaningful

difference in value between the Hopi half of the land and the Navajo half. Thus, it ordered no owelty award.

The owelty action was brought pursuant to § 640d-5(d) of the Settlement Act, which authorizes the district court to award damages for any difference in value between the halves of the partitioned land with "improvements and grazing capacity fully restored."[3] The Hopi appeal from the judgment, arguing that the district court undervalued the Navajo land because it misinterpreted the owelty statute. The Hopi also contend that they are entitled to prejudgment interest, if they succeed on their claim for owelty.

In the cross-appeal, the Navajo assert that the Hopi should be judicially estopped from seeking owelty. Moreover, the Navajo want an owelty payment from the Hopi, and argue that the Hopi got the better land. We hold that

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[3] Section 640d-5(d) of the Settlement Act provides:

In any partition of the surface rights to the joint use area, the lands shall, insofar as is practicable, be equal in acreage and quality: *Provided*, That if such partition results in a lesser amount of acreage, or value, or both to one tribe such differential shall be fully and finally compensable to such tribe by the other tribe. The value of the land for the 18 purposes of this subsection shall be based on not less than its value with improvements and its grazing capacity fully restored: *Provided further*, That, in the determination of compensation for any such differential, the Federal Government shall pay any difference between the value of the particular land involved in its existing state and the value of such land in a fully restored state which results from damage to the land which the District Court finds attributable to a failure of the Federal Government to provide protection where such protection is or was required by law or by the demands of the trust relationship.

the district court erred in its interpretation of the statute and remand for a determination of the amount of owelty due the Hopi. We affirm the district court's denial of owelty to the Navajo. We further hold that the Hopi are not judicially estopped from seeking owelty, and that they must receive prejudgment interest on it.

B. Improvements

The principal legal contention we must resolve is the Hopi's argument that the district court misconstrued the statutory language directing that the value of the partitioned land "shall be based on not less than its value with improvements and its grazing capacity fully restored." § 640d-5(d). The district court determined the land's worth with its grazing capacity fully restored and with only those improvements that, as described by the district court, were necessary to restore the grazing potential to the maximum extent feasible. Presumably, the district court was referring to improvements such as roads, stream diversions, irrigation canals, and fences, which can help improve the land's grazing capacity.

On appeal, the Hopi assert that the district court wrongly interpreted the plain language of the statute calling for the valuation of "improvements." The Hopi argue that the district court should have valued all improvements, including hospitals, schools, churches, hogans, trading posts and other structures. The Hopi contend that these improvements all contribute to the value of the land as an Indian reservation. At trial, the Hopi expert agreed that the land should be appraised as

an Indian reservation, with potential for, *inter alia*, agriculture, grazing, rural residential habitation and limited commercial enterprise. The Navajo's competing expert took the view that the land should be valued strictly as a cattle ranching operation and that most buildings were of no significance.

The legislative history does little to answer the question of whose valuation is correct, as it refers to improvements without ever giving any indication of what type of improvements Congress contemplated. *See, e.g.*, H.R. Rep. No. 909, 93rd Cong., 2d Sess. (1974); S. Rep. No. 1177, 93rd Cong. 2d Sess. (1974). Thus, we focus on the statute itself. The Navajo's valuation appears to do violence to the statutory language, for it ignores the Congressional directive to value "improvements." The district court's view that "improvements" should be limited to those necessary to restore the land to full grazing capacity also finds no support in the statute. Indeed, the statute's conjunctive structure suggests that an independent value should be assessed for "improvements" and for the land fully restored. Moreover, Congress did not qualify the word "improvements;" the statute contains no express limitation on the *type* of improvements that can comprise the value of the partitioned land, or the *purpose* that the improvements must serve before they can be included in value.

Nevertheless, we cannot add the full value of the buildings on the NPL to the value of the Navajo land, since most of the structures on the NPL are privately owned and are not part of the real property that was given to the Navajo Nation at partition. For example, the residences, primarily hogans or smaller structures, are

owned and were paid for by individual Navajo. The same is true of the barns, sheds and corrals on the NPL. Moreover, even if these structures were not privately owned, they likely would have no appreciable value for owelty purposes, as the Hopi expert testified that the Hopi routinely demolish such structures once the Navajo have abandoned them.

The buildings on the NPL that have the most significant intrinsic value include schools and hospitals that belong to the United States and which, like the private residences, cannot be added directly to the value of the NPL because they were not partitioned to the Navajo. The same logic applies to churches and missions on the NPL, which are owned and managed by their respective religious organizations, and to structures erected on the NPL by third party entrepreneurs, such as the Peabody coal mining operation.

The Hopi therefore alternatively contend that the district court should not value the improvements themselves, but rather the land's enhanced value because those improvements are on it. We believe this is the only interpretation of the statute that gives meaning to all of its terms and the one that best accords with Congressional intent. The district court concluded that "there is no competent evidence that the NPL had more improvements than the HPL which were necessary to restore the partitioned lands" because it had first (erroneously) interpreted what "improvements" means. Consequently, the district court made no findings of fact regarding the contributing value of such things as schools, churches, and hospitals, to the value of the JUA. Nor did the court evaluate the methodology underlying the competing

expert opinions about such contributing value. For this reason, we remand to the district court so that, guided by the correct interpretation of "improvements," it may consider and evaluate the conflicting expert opinions, and decide what owelty payment, if any, is due the Hopi based on the contributing value of all improvements.

C. Grazing capacity

Finally, we turn to the Navajo's Rule 59(e) motion, essentially a request for owelty, which the district court denied. The Navajo argue that because the district court accepted the opinion of an expert who opined that the HPL fully restored would support more grazing than the NPL fully restored, the district court was obligated to award the Navajo owelty relief. The district court, however, correctly noted in accepting that opinion that the same expert also testified to a 10 to 15 percent margin of error in his restored grazing capacity figures. Any difference between the HPL and the NPL was within that margin of error, and hence not statistically relevant. The district court did not err in denying the Rule 59(e) motion.

D. Judicial Estoppel

The doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litigation. *Morris v. State of Cal.*, 966 F.2d 448, 452 (9th Cir. 1991), *cert. denied*, 506 U.S. 831 (1992). The Navajo argue that the Hopi should be judicially estopped from seeking owelty because, prior to partition, the Hopi represented to the district court that the partition would not result in an

owelty payment. We agree with the district court that this argument should be rejected because no court ever adopted the original Hopi position that the partition would not result in an owelty payment. *See Migard Tempering, Inc. v. Selas Corp.*, 902 F.2d 703 (9th Cir. 1990) (court must adopt position for judicial estoppel to apply).

E. Prejudgment interest

Our decision here is controlled by *Hopi Tribe*, 46 F.3d 908. There, we held that § 640d-17(e) of the Settlement Act, which allows the Hopi and the Navajo to sue one another for all remedies available in federal district court, allows for recovery of prejudgment interest. Although that decision was reached in the context of a suit for fair rental value of post partition use of the HPL by the Navajo, its logic applies with equal force in this context. Thus, we hold that the Hopi are entitled to prejudgment interest.

F. Conclusion

We therefore reverse the district court's denial of owelty and remand so that the Hopi may seek compensation for any disparity in value and prejudgment interest thereon. In all other respects, we affirm the district court's valuation of owelty.

IV. THE DAMAGES CASE, Appeals Nos. 94-17032, 95-15029

A. Background

In the action giving rise to these appeals, the Hopi sued the Navajo and the United States to recover for

damages to the HPL caused by Navajo overgrazing prior to the 1979 partition. The district court held that while the conduct creating liability occurred before the 1979 partition, the Hopi's compensation would be measured by the value of the lost grazing opportunity that the Hopi suffered after partition. In other words, the Hopi could recover the post-partition difference in value between the land "as is" and the land fully restored. None of the parties contest this ruling on appeal.

After trial, the district court awarded the Hopi $3,167,388.84 in damages against the Navajo, and absolved the United States of liability on the ground that the government made reasonable efforts to protect the range. Both the Hopi and the Navajo challenge the district court's calculations. Their contentions lack merit, except for the Hopi complaint that the district court wrongly denied damages for lost grazing opportunity on lands that the Hopi set aside for wildlife. Accordingly, we remand so the district court can add the value of that lost opportunity to the damages award. Further, the Navajo argue that the United States should be held liable for its failure to adequately protect the range. We agree with the district court's application of a reasonableness standard and affirm the district court's denial of liability on the basis of factual findings that are not challenged as clearly erroneous.

B. Calculation of damages

We turn first to the contentions concerning the district court's calculation of damages. The court computed the lost grazing opportunity using the following method.

First, it estimated the fully restored annual grazing capacity of the HPL, finding that the HPL could be restored to excellent condition, but maintained as grazing land at only 75% of that condition. The Hopi challenge this finding on appeal. Second, the court determined that the HPL would be fully restored by 1995. Third, it estimated the total lost grazing capacity by calculating the difference between the fully restored grazing capacity and the actual annual grazing capacity for each year between 1979 and 1995, and then adding up the lost opportunity for each of these years. Fourth, it put a price on the lost grazing opportunity by referring, as in the use case, to adjusted private Arizona lease rates instead of federal lease rates. Finally, the court discounted the future damages to their present value. These three steps are not challenged.

When estimating the total lost grazing capacity, the court made several adjustments that the Hopi challenge here. It decreased its estimate of the lost grazing opportunity by making "management cuts" to account for the Hopi practice of grazing cattle instead of sheep. Sheep typically graze all available forage. Cattle, by contrast, do not spontaneously graze hard-to-reach forage, prefer certain kinds of terrain over others, and tend to congregate within one-and-a-half miles of water sources. Because cattle use less acreage, reasoned the district court when making the cuts, the Hopi lost less grazing opportunity than they would have if they grazed sheep. In addition, the court excluded the lost opportunity associated with seven range units that the Hopi reserved for wildlife rather than livestock; we refer to these exclusions as the "vacant range cuts."

The district court also made an adjustment that the Navajo challenge on appeal: it increased its estimate of lost grazing to account for the eventual completion of water development programs on the HPL. Completion of these projects increases the acreage accessible to cattle, thereby increasing the Hopi's lost opportunity.

We address the Hopi challenges first. The Hopi argue that the district court clearly erred in setting potential grazing capacity at 75%, rather than 100%, of excellent condition. However, several experts, including the Hopi's own, testified that the range could not be grazed at 100% of excellent condition. The court's finding was not clearly erroneous.

The Hopi also challenge the district court's management and vacant range cuts, arguing that the value of the lost grazing opportunity should be premised on the Hopi's right or opportunity to use the land, rather than how the Hopi actually used the land. They contend that the management cuts were inappropriate because they could have fully utilized the HPL's grazing capacity by raising sheep instead of cattle. Further, they contend that the vacant range cuts were inappropriate because they could have used their seven vacant range units for grazing, but chose to leave that land fallow in order to accelerate the restoration process. The Navajo and the government respond that damages should be limited to real opportunity costs, which are tied to the Hopi's actual use of the land.

The Restatement (Second) of Torts § 929, concerning Harm to Land from Past Invasions, provides the most relevant authority. It states that "[i]f one is entitled to

judgment for harm to land resulting from past invasion . . . , the damages include compensation for . . . the loss of use of the land. . . . " Comment d to § 929 explains that "the plaintiff is entitled to recover for the past or *prospective loss of use* . . . as stated in § 931." (emphasis added). Comment b to § 931 provides:

> The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least the rental value of the . . . land during the period of deprivation. *This is true even though the owner in fact has suffered no harm through the deprivation, as when he was not using the subject matter at the time.* . . . The use to which . . . the land is *commonly put* . . . [is] to be taken into consideration as far as [it] bear[s] upon the value of the use to the owner or the rental value.

Restatement (Second) of Torts § 931 cmt. b (emphasis added). Thus, under the Restatement the value of the lost grazing opportunity turns on the type of use to which the land was "commonly put." The record reveals that the Hopi have "commonly put" the HPL to use for grazing cattle, rather than sheep. The district court made the management cuts to exclude forage that was inaccessible to cattle. This was in accordance with the Restatement principle. We affirm the district court's management cuts.

Our result differs with respect to the vacant range cuts. Unlike the acreage excluded by the management cuts, the land excluded under the vacant range cuts was accessible to cattle. Thus, the question is whether the Hopi should be awarded lost opportunity damages for land that could have been put to its common use, but

which the Hopi chose not to use in the customary manner. We hold that the Hopi should be awarded damages for lost grazing opportunity on the vacant ranges. As the Restatement explains, an owner can suffer deprivation even if the owner "was not using the subject matter at the time." *Id.* We therefore reverse the district court's vacant range exclusion and remand for inclusion of the lost grazing opportunity on the vacant range units in the Hopi's damages award.

The Navajo argue that the upward adjustment for the future completion of water development programs constituted clear error because such programs will have no impact on Hopi grazing. They contend that the programs are saddled with inadequate funding and resistance from the Hopi themselves, preventing their development. However, the Navajo's own expert testified that these programs had made substantial progress, and the Hopi's expert recommended the upward adjustment. The court did not clearly err in following that recommendation.

The Navajo also argue that the damages award was excessive. The Navajo and the Hopi both agree that the damages award, coupled with the post-partition rent, should equal the fully restored value of the HPL. In other words, they agree that the value of the HPL fully restored is equal to lost grazing opportunity (damages) plus available grazing opportunity (rent). The Navajo point out, however, that the payment they made in the rent case, *Hopi Tribe*, 46 F.3d 908, plus the damages award here, adds up to more than the worth of the fully restored HPL. From this the Navajo conclude that the damages award is excessive. The Navajo's argument is without merit. The rent award included considerations unrelated to actual

grazing, such as financial penalties for trespassing livestock. These penalties and other factors unrelated to grazing, rather than an excessive damages award, are what cause the appearance of overcompensation. The district court did not clearly err in finding that the damages award was not excessive.

Finally, the Navajo challenge the testimony of expert John Workman, contending, as they did in the use case, that he is not qualified. *See supra* II.C. We reject their contention for the same reasons articulated in part II.C. *Id.*

C. Federal Government Liability

Finally, we address the question of the United States' liability. We must decide whether the United States should bear any fiscal responsibility for the tragedy of these commons. The district court held that if the United States negligently failed to protect the JUA, the United States, together with the Navajo, would be jointly and severally liable for damages to the land. The district court concluded that the government was not negligent, stating that the Hopis failed to sustain their burden to show "that the damage to the HPL was caused by unreasonable government action or inaction."

The Hopi appealed that judgment, arguing that the district court erred by using negligence, rather than strict liability, as the standard for government liability. After oral argument in these appeals, the United States settled with the Hopi for $2,400,000, and the Hopi moved to abandon the portion of their appeal contesting the decision in favor of the government. We granted that motion,

but allowed the Navajo to rely on the arguments in the Hopi briefs with regard to joint liability. Additionally, the Navajo contend that the United States should be exclusively liable.

We agree with the district court that the government's behavior should be evaluated using reasonableness as the yardstick. The district court assessed government liability in accordance with the only available provision addressing damages to the land, § 640d-5(d).[4] That section provides that the government will be liable for damages to the land if the government fails "to provide protection where such protection is or was required by law or by the demands of the trust relationship." Protections required by law are coterminous with those required by the trust relationship. *See United States v. Mitchell*, 463 U.S. 206, 224, 103 S.Ct. 2972 (1983) (statutory and regulatory provisions define contours of federal government's trust obligations when it assumes responsibility as a trustee for Indian lands); *accord* 25 C.F.R. 153.3 (1976) (regulations are promulgated to "carry out the Secretary's trust responsibility" over the JUA). Since the government's liability is predicated on trust obligations, it need take those protective measures that a reasonable or prudent trustee would take. *Navajo Tribe v. United States*, 9th Cir. 336, 400 (1986); Restatement, (Second) Trusts, § 176.

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[4] Section 640d-5(d) is an owelty provision. However, it also discusses the government's liability for the difference in value between the land "as is" at the time of partition and the land fully restored. That is, 640d-5(d) covers damages as well as owelty. The parties on appeal do not dispute the district court's reliance on this section.

The district court may well have erred in describing the appropriate standard as a negligence, or reasonable person standard, rather than a fiduciary, or reasonable trustee standard, but the Hopi have not argued that the district court measured the government's fault by the wrong standard. Rather, the Hopi ask that the government be held strictly liable, without regard to fault. We therefore hold that the district court did nor err in determining the government's liability using the reasonableness standard rather than a standard of strict liability. The Hopi do not challenge the findings as clearly erroneous.

CONCLUSION

We affirm the entire judgment of the district court in the use case. In the owelty case, we remand so that the district court may determine the amount of owelty, if any, due the Hopi based on the value of the land and the contributing value of improvements, and affirm in all other respects. In the damages case, we reverse the district court's decision not to credit the Hopi for lost opportunity on the seven vacant range units set aside for wildlife, but otherwise affirm the judgment.

AFFIRMED in part, REVERSED and REMANDED in part. Each party shall bear its own costs on appeal.

FLETCHER, Circuit Judge: Partial Concurrence and Partial Dissent

I concur substantially in the majority's opinion.

I respectfully dissent, however, from the majority's refusal to reverse the district court's holding that the

United States is not liable for failure to protect the HPL from overgrazing prior to partition in 1979.

The majority concludes as do I that the district court applied the wrong standard in assessing the government's liability. The district court held the government to a negligence standard, holding the Hopi responsible for proof that "the damage to the HPL was caused by unreasonable government action or inaction," rather than to the duty of a reasonable trustee, who is under an affirmative duty "to the beneficiary to use reasonable care and skill *to preserve the trust property.*" (Restatement (Second), Trusts, § 176(1959)) (emphasis added).

The government's obligation as trustee required it to take those protective measures that would have prevented the spoliation of the trust land by overgrazing – the very conduct by the Navajo that proper oversight by the government should have prevented. The government as trustee had affirmative duties of oversight – an obligation to investigate and to be informed and to act affirmatively to assure the protection of the grazing land – a fragile ecosystem – from overgrazing. The government's obligation, in short, was to prevent the Navajo from doing the very acts that imposed liability on the Navajo.

My disagreement stems from the majority's conclusion that despite the district court's error, its holding should stand because the Hopi have not challenged on appeal the district court's finding that the government acted reasonably.[1] But that finding of reasonableness was

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[1] After oral argument in these appeals, the United States settled with the Hopi for $2,400,000, and the Hopi moved to

in the context of the inappropriate negligence standard – what is reasonable conduct for a non-fiduciary is not necessarily reasonable conduct for a trustee since the trustee has an affirmative duty to protect and preserve the trust res. That is the very point the Hopi make: they assert that the government breached its fiduciary duty to protect the HPL from overgrazing. They offer the proof of the breach in the condition of the land, a condition directly traceable to the overgrazing.

"Reasonableness" as a standard is only meaningful when defined in context; a "reasonable" trustee must clearly do more than a "reasonable" person would to prevent the destruction of trust property.

I would therefore remand to the district court so that it could determine the government's liability by properly applying the reasonableness standard to which a trustee is held. Since the Hopi did not challenge the factual findings below as clearly erroneous, whether the government fulfilled its obligations as trustee should be determined in light of those findings.

I do not ignore the fact that the relationship of the United States to the Navajo and the Hopi is unique. It owes trust duties to each; if it failed in its duties, its failures were to both (failure to protect the trust property to the detriment of the land and to both the Hopi and the Navajo; failure to oversee and impose proper controls on the grazing practices of the Navajo).

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abandon this portion of their appeal. We granted that motion, but allowed the Navajo to rely on the Hopi's arguments with regard to joint liability.

Upon remand, I would require the district court to determine and assess the government's liability and fiscal obligations and determine the effect, if any, on the amount owed to the Hopi by the Navajo.

Accordingly, I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

VERNON MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe, Plaintiff, v. PETERSON ZAH, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe, Defendant, and THE UNITED STATES OF AMERICA, Defendant.	CIV 76-934 PHX EHC FINDINGS OF FACT and CONCLUSIONS OF LAW and ORDER re: DAMAGE CLAIM (Filed Jan. 15, 1993)

INTRODUCTION

Plaintiff Vernon Masayesva is the duly authorized Chairman of the Hopi Tribal Council of the Hopi Tribe, and appears herein as representative of the Hopi Tribe and its villages, clans and individual members.

Defendant Peterson Zah is the duly authorized Chairman of the Navajo Tribal Council, and appears

herein as representative of the Navajo Nation[1] and its chapters, clans, and individual members.

This is a suit brought by the Hopi Tribe pursuant to Section 18 of the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d-17(a)(3), 88 Stat. 1714, P.L. 93-531 (1974) ("the Settlement Act") against the Navajo Nation and the United States for damage to the Hopi Partitioned Lands ("HPL") from Navajo overgrazing.

In 1958, Congress authorized litigation to settle title to the 1882 Reservation. *See* 72 Stat. 403, P.L. 85-547 (1958). In 1962, a three-judge District Court held that the Navajo and Hopi Tribes had an undivided and equal interest in the 1882 Reservation outside the boundaries of land management district 6 ("District 6") which was exclusively occupied by Hopis. *Healing v. Jones,* 210 F.Supp. 125, 191-92 (1962), *aff'd,* 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963) (per curiam). This area of undivided and equal interest was called the Joint Use Area or "JUA". When joint use by both Navajos and Hopis proved unworkable, *see Hamilton v. Nakai,* 453 F.2d 152 (9th Cir. 1971), *cert. denied,* 406 U.S. 945 (1972); *Hamilton v. MacDonald,* 503 F.2d 1138 (9th Cir. 1974); *Sekaquaptewa v. MacDonald,* 544 F.2d 396 (9th Cir. 1976), *cert. denied,* 430 U.S. 931 (1977), Congress passed the Settlement Act and authorized partition of the JUA (after a mediated

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[1] The Navajo Tribal Code, 1 N.T.C. § 301, requires officials of the Navajo Tribe to use the term "Navajo Nation" rather than "Navajo Tribe". Throughout this opinion, the Court will use the term employed by the Navajos.

negotiation effort by the Tribes). After the mediated negotiation failed, the District Court partitioned the JUA. Partition was final on April 18, 1979.

The Settlement Act also authorized a number of actions for money damages. 25 U.S.C. § 640d-5(d) authorized a suit for "owelty" payments by either tribe;[2] the Hopi Tribe claims that it received a less valuable portion of the JUA in partition, and is therefore entitled to payments to equalize the value. *See* CIV 58-579 PCT EHC (supplementary proceedings). Section 640d-15 provided for rental payments for use of the HPL and the Navajo Partitioned Lands (NPL) by members of the other tribe after the date of partition and until relocation is completed. *See* CIV 85-801 PHX EHC. Section 640d-17(a)(1) authorized an action for an accounting of sums collected by either tribe since 1957 for trader license fees, lease proceeds, or other charges for doing business on the JUA, and the payment of one-half of those sums to the other tribe; this suit was settled. *See* CIV 76-935 PHX EHC. Section 640d17(a)(2) authorized an action for the recovery of one-half of the fair value of the grazing and agricultural use by either tribe between 1962 and the partition date. *See* CIV 76-936 PHX EHC (the "use" case). Finally, section 640d-17(a)(3) authorized the above-captioned suit for damage to the HPL.

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[2] Owelty is "a sum of money paid by one of two coparceners or co-tenants to the other, when a partition has been effected between them, but, the land not being susceptible of division into exactly equal shares, such payment is required to make the portions respectively assigned to them of equal value." *Black's Law Dictionary* (4th ed).

The damage case was consolidated for trial with the owelty and use cases, and was tried from July 28-August 12, 1992. Although there are common issues which merit discussion here, separate findings and judgments will be issued in each case.

On July 2, 1992, this Court issued an order regarding the Navajo Nation's and government's liability in the damage case. This Court denied the government's motion for summary judgment, holding that sections 640d-5(d) and 640d-17(a)(3) waived the government's sovereign immunity to the damage action, and that the Hopi Tribe could seek recovery against the government if the government had failed to "provide protection [for the HPL] where such protection is or was required by law or by the demands of the trust relationship." 25 U.S.C. § 640d-5(d). This Court also denied the government's motion to dismiss the Navajo cross-claim for indemnity, and denied the Navajo Nation's motion for summary judgment.

In addition, the Court outlined how damages would be measured. The Hopi Tribe claimed only temporary damage to the land, or lost grazing opportunity. The Court held that lost grazing opportunity resulting from Navajo overgrazing would be measured for each year that the Hopi Tribe is deprived of the use of a fully restored range from the date of partition until the range is expected to reach its fully restored state. "Fully restored" means restoration "to the maximum extent feasible", as utilized in 25 U.S.C. § 640d-18(a):

> Notwithstanding any provision of this subchapter, or any order of the District Court pursuant to section 640d-2 or 640d-3 of this title, the

> Secretary is authorized and directed to immediately commence reduction of the numbers of all the livestock now being grazed upon the lands within the joint use area and complete such reductions to carrying capacity of such lands, as determined by the usual range capacity standards as established by the Secretary after December 22, 1974. The Secretary is directed to institute such conservation practices and methods within such area as are necessary to restore the grazing potential of such area *to the maximum extent feasible.*

(Emphasis added).

FINDINGS OF FACT

There are a number of issues to be resolved in order to arrive at a determination of the amount due the Hopi Tribe in the damage case. First, the Court must determine the fully restored grazing capacity of the HPL; i.e. what is the maximum extent feasible to which the HPL can be restored? Second, the Court must decide when the HPL will reach that fully restored capacity. Next, the Court must determine how much of that grazing capacity was lost; i.e. what was the actual grazing capacity for each year after partition, and what part of that lost grazing capacity would have been utilized by the Hopi Tribe? The Court then must determine what value to place on the lost grazing opportunity. Finally, the Court must determine how much of that damage was caused by Navajos, whether the government should be held liable for any of the damage to the HPL, and whether the government should indemnify the Navajo Nation for its liability.

I. What is the fully restored grazing capacity of the HPL?

"Grazing capacity" or "carrying capacity" is the maximum number of animals which can be grazed on a parcel of land without causing range deterioration. Grazing capacity fluctuates due to climate (rainfall, temperature, and wind), and other environmental influences such as insects and viral outbreaks. All of the experts who testified in this case agreed that grazing capacity is an *estimate* with a margin of error.

Grazing capacity can be reported in "Animal Unit Years" (AUs) or "Animal Unit Months" (AUMs). An AU is the amount of forage a 1000 lb. cow consumes in one year; put another way, the AU value for a unit of land indicates how many 1000 lb. cows could graze on that unit of land for one year. An AUM indicates how many 1000 lb. cows could graze on a parcel of land for one month, if they were allowed to consume all of the available forage in that month (an AU multiplied times 12).[3] A higher AU or AUM value for a parcel of land indicates that the land can support more livestock, i.e. has a higher grazing capacity, because it has more forage. A Sheep

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[3] For example, if the grazing capacity of a section of land is 8 AU/section, the grazing capacity expressed in AUMs would be 96 AUM/section. That section of land could support eight 1000 lb. cows for an entire year, but could support 96 cows if all forage was consumed in one month (and no cows were grazed for the remaining 11 months). 8 AU/section and 96 AUM/section represent the same amount of forage. Because AUs and AUMs represent an *amount* of forage, this Opinion will express lost grazing opportunity (lost forage) over a period of time in terms of an AU or AUM value.

Unit (SU) is the amount of forage consumed by a 150 lb. sheep in one year; the conversion from SUs to AUs is at issue in the "use" case and will not be addressed here.

"Range health", or the condition of the range, is generally classified as "poor", "fair", "good" and "excellent". When the range is in poor condition, there may be less vegetative cover (i.e. more bare ground), or there may be ground cover with undesirable forage species. When the range is in excellent condition, there is a variety of good forage species, the soil is protected by ground cover, and the range is in a stable condition. As with all estimates of grazing capacity, the carrying capacity of the land when it is in excellent condition will vary due to environmental factors.

In order to improve range condition, "management inputs" are required, such as the addition of fences to evenly distribute livestock, the addition of more water sources to distribute livestock across the range, utilization of different livestock types to use the range in a different manner, or the deferral of grazing altogether. When a range improves from poor to excellent condition, it does not do so in a linear fashion; range improvement from poor to fair is slow, the condition increases rapidly from fair to good, and then slows from good to excellent.

Dr. Thadis Box, the Hopis' range management expert,[4] and George Knoll, a range conservationist

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[4] Dr. Thadis Box is a Professor of Range Management at New Mexico State University, and has taught at other universities, as well. He has authored a range management textbook and a number of articles on range management. *See* Ex. 1 (report); App. A to Ex. 1 (resume).

formerly employed by the Bureau of Indian Affairs (BIA),[5] both testified that the range is fully restored at excellent condition, and that it is feasible to restore the land to this condition. The BIA and other government agencies such as the Forest Service, Soil Conservation Service ("SCS"), and the Bureau of Land Management ("BLM") use excellent condition as the goal for a restored range.

"Excellent condition" is defined by the BIA as containing 75-100% of the species found when a site is in "climax". Simply put, a plant community is in climax condition when it is stable for a certain climate and soil type; i.e. it contains those plant species in the final stage of succession present in an undisturbed ecosystem. The determination of range condition is measured by a "deviation from climax" model, in which the difference between existing plants in a sample and plants in a reference "climax" area is measured.

The Navajos argue that the range should be judged fully restored when it reaches a condition similar to the condition of a well-managed ranch in northern Arizona or New Mexico, many of which are in fair or good condition. A number of experts testified on this issue for the Navajo Nation.

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[5] Mr. Knoll was a range conservationist for the BIA from 1957-1984; he conducted numerous range condition surveys and was engaged in various stages of range management and conservation on Indian reservations. Since 1984, he has been employed as a consultant in range conservation for the BIA. *See* Ex. 2302 (report); Ex. 2462 (resume).

Dr. Robert Bement[6] opined that he disagrees with the range classifications of poor, fair, good and excellent based on the deviation from climax model. He testified that plant communities cannot reach climax condition in arid lands because fluctuations in precipitation, temperature, and wind prevent maximum forage production and the "ideal" species composition. Instead, he testified that range condition should be based on the production of all plant species used by grazing animals, such as the perennial grasses, including gramas, Indian ricegrass, galletas, and sacatons.[7] Dr. Bement believes that the HPL is presently in its fully-restored condition, because "good" perennial forage species are present to take advantage of a growth opportunity (rain and temperature).

Dr. Leslie McFadden and Dr. Joseph McCauliffe also testified on behalf of the Navajo Nation about the ecological condition of the HPL.[8] Both Drs. McFadden and

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[6] Dr. Bement was employed for many years by the U.S. Agricultural Research Service as "Scientist in Charge" of the Central Plains Experimental Range, and has been on the faculty of Colorado State University. *See* Ex. 297 (report); Ex. 334.1c (resume).

[7] Perennial grasses are indeed included as climax species. Tom Davis, range conservationist for the BIA Phoenix Area Office, testified that climax includes only perennial vegetation since annual vegetation is more weather dependent; if the stocking rate is established based on annuals one year, it may be very different the next year. The BIA cannot set stocking rates every year, so it must rely on less variable indicators of range health, such as perennial vegetation.

[8] Dr. Leslie McFadden is an Associate Professor in the Department of Geology at the University of New Mexico. *See* Ex. 334.1a (resume). Dr. Joseph McCauliffe is presently the Director

McCauliffe testified that the HPL consists largely of "sand-mantled" (sand-covered) landscape which holds moisture, prevents run-off, and hence exhibits rapid recovery after the removal of vegetation. In other words, the HPL is "ecologically resilient", and Dr. McCauliffe testified that the HPL has totally recovered from overgrazing in the time span of about 15 years and is now some of the most productive range land in Arizona. Dr. McCauliffe testified that there is as much vegetation coverage with desirable forage species in the areas he studied as could be expected on land in this precipitation zone. Significantly, neither Drs. McFadden nor McCauliffe testified about the present grazing capacity of the range, and neither had any training in range management.

Gene Price, a rural property appraiser,[9] estimated the fully restored value at that grazing capacity that Price believed comparable ranches in good condition exhibit. He clarified on cross-examination that this did not represent excellent condition.

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of Research at the Desert Botanical Garden in Phoenix, and was previously an Assistant Professor of Biology at the University of Nevada, Las Vegas. *See* Ex. 334.1e (resume). Their combined report is Ex. 292.

[9] Gene Price is an accredited appraiser of rural properties who has conducted numerous appraisals of ranch property, and conducted appraisals for the Navajo Nation for the damage, owelty, and use cases. He did not do a report for the damage case, but his opinion regarding the fully restored grazing capacity of the HPL is contained in his report for the owelty case, Ex. 181. *See* Ex. 334.1b (resume).

The Court will accept the testimony of Dr. Box and Mr. Knoll that it is feasible to reach excellent condition, and that the HPL is not yet in excellent condition. Given that this Court has ruled that "fully restored" means to the "maximum extent feasible", the Court concludes that the land is fully restored when it is in excellent condition.

The Court must also determine whether the HPL can be maintained at 100% of the fully restored grazing capacity (at 100% excellent condition). Since this Court must determine the amount of lost grazing opportunity to the Hopi Tribe, the 100% fully restored value cannot be used as a comparison against actual grazing capacity for each year if the Hopi Tribe could not have maintained the range at 100% capacity.

To determine a feasible grazing capacity when the range is in excellent condition, both Dr. Box and Mr. Knoll utilized a number of range studies that had been conducted on the JUA prior to partition, and on the HPL after partition.

The first study, conducted in 1963 by the BIA, was a comprehensive analysis of the soil and vegetation types on the JUA which categorized the JUA into "range sites", or areas with the potential for producing like amounts and kinds of vegetation. *See* Ex. 2253 (Summary of 1963 Range and Soil Inventory). That study calculated the actual grazing capacity of the JUA in 1963, and also estimated the fully restored grazing capacity of the JUA (the "potential" grazing capacity). The potential grazing capacity was estimated to be 40,179 AUs or 482,148 AUMs. Thadis Box testified that 19,433 AUs or 233,196 AUMs were on land which became the HPL.

The second study was conducted in 1973 by the BIA. *See* Ex. 2303 (Summary of 1973 range reconnaissance report). The study calculated the actual grazing capacity for that year, but did not make any new site or soil surveys or calculate new numbers for the potential grazing capacity of the JUA.

A third survey was conducted of the HPL in 1983 by Dames and Moore. *See* Ex. 2304 (Dames and Moore study). This study determined the range condition of the HPL, but did not calculate actual or potential grazing capacity estimates.

From 1980-1984, the SCS conducted an extensive range survey of the HPL which included a soil survey, determination of range sites, a vegetation survey, and an update of range condition guides. This study also did not calculate the potential grazing capacity of the HPL.

In 1984, the BIA used the data from the Dames and Moore and the SCS studies to calculate actual and potential grazing capacities of the HPL. The BIA concluded that the potential carrying capacity of the HPL, i.e. the fully restored grazing capacity, was higher than estimated in 1963 at 23,582 AUs or 282,984 AUMs. *See* Ex. 3 (Draft preliminary report of proposed stocking rate and potential carrying capacity of HPL, Phoenix Office of BIA).[10]

Dr. Box testified that the 1980's surveys were more accurate because the 1963 survey was conducted following a period of drought at a time when much of the vegetation was dormant; the 1980's surveys followed a

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[10] No range survey of the NPL has been completed since 1973.

period of no grazing and a run of wet years, so that more of the vegetation types were visible. Further, the latter surveys utilized more current range condition guides. Box accepted the BIA's calculation for the fully restored grazing capacity for the HPL, of 23,582 AUs or 282,984 AUMs.

Dr. Box testified that it is feasible for the HPL to be maintained at 23,582 AUs, the maximum feasible grazing capacity, without causing deterioration of the range. He testified that this amount would be reduced during dry years, and increased during wet years, but that the average could be maintained at 23,582 AUs or 282,984 AUMs.

George Knoll, who participated in the 1963, 1973, and 1983 range studies in various capacities, testified that the HPL cannot be maintained at 100% of its grazing capacity due to fluctuations in the plant community in response to environmental stresses (such as weather, animal predation, etc.).[11] Further, Knoll testified that when a range reaches 75% excellent condition, range management goals change from improvement to maintenance of forage. He did not think that the range can be maintained at even 85% excellent condition. Knoll testified that the potential grazing capacity at 75% of excellent condition is 186,691 AUMs.[12]

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[11] Dr. Bement agreed that the condition of the range fluctuates widely with climate.

[12] The 75% excellent condition AUM value is not simply 75% of the AUMs at 100% excellent condition. Instead, Knoll calculated the value of the acres/AUM for each range site at 75% biological capacity (which is not a linear relationship) and multiplied the acres/AUM times the acreage in each range site.

Dr. Box's testimony in fact lends support for the conclusion that it is not possible to *maintain* 100% capacity. He testified that he had seen only a few examples of range in excellent condition, including sacred sites in District 6 and between farming areas where no grazing occurs, and in the Santa Rita experimental range south of Tucson, AZ. On cross-examination, Dr. Box admitted that his use of "excellent" condition means "pristine", and at deposition testified that he had seen land in "pristine" condition only on the tops of buttes where no wildlife graze, and in Australia far from water sources. Dr. Box also admitted that a well-run ranch could not be maintained at excellent condition if the rancher wanted to make a living, because with the "proper grazing pressures" on the land, it could not be maintained in excellent condition (let alone at 100% excellent condition).

The Court concludes that 75% of excellent condition is the maximum extent feasible to which the HPL can be restored and maintained as grazing land. 75% excellent condition is 15,558 AUs or 186,696 AUMs.

Knoll also testified that for purposes of determining how much of the fully restored grazing capacity was lost to the Hopi Tribe, further reductions should be made to the fully restored capacity for that amount of forage that could not be harvested.

He then added the AUMs for each range site to arrive at a total AUM value for the HPL. *See* Ex. 2260 (Range site summary of HPL and NPL, with calculations of AUM at 100% and 75% excellent condition).

Knoll made three types of "cuts". First, he made "site association" cuts, where one site is more heavily grazed than an adjacent site. For instance, livestock will prefer to graze more on level, non-rocky land than on adjacent steep, rocky land. This reduction in grazing capacity ensures that the more heavily grazed site is not overgrazed. Second, Mr. Knoll made cuts for "accessibility", or the ability of livestock to graze around barriers, such as escarpments, arroyos, and brush. He testified that the Hopis graze only free-roaming cattle, which have a difficult time accessing rough terrain, especially without a herder. Third, he made cuts for water availability, as grazing is heavier around water sources. He testified that on gentle sloping land, cattle will graze about one to one and one-half miles from water without being herded.

Knoll testified that there was a 37% loss of harvestability due to these cuts, giving a total of 117,615 AUMs of harvestable forage at 75% excellent condition. Knoll then made an *upward* adjustment for the future completion of water development programs on the HPL (removing 80% of the cut attributable to water accessibility), which increased the amount of harvestable forage at 75% excellent condition to 146,301 AUMs. He further testified that improvements could not significantly alter the accessibility and site association problems, and so made no upward adjustment for future improvements in those areas.

Dr. Box, on the other hand, testified that he assumed the Hopis would utilize all the available forage through intensive management inputs (fencing and water improvements where necessary to utilize the entire range), and by utilizing livestock which would harvest all

of the available forage (sheep and goats under a herder, as well as cattle).

However, Dr. Box agreed that the harvestable capacity would be decreased if only cattle were grazed. He testified that if only cattle were used, the harvestable forage would have to be reduced 5-10%. On cross-examination, Dr. Box acknowledged that site limitations are more severe on cattle than on sheep and goats, and that there would be physical limitations on harvesting all the available forage if only cattle were grazed. Moreover, he agreed that Hopis do not employ intensive management techniques in District 6. He did not make any accessibility, site association, or water availability cuts in his estimate of grazing capacity.

This Court concludes that the reductions taken by George Knoll were reasonable, and best estimate the maximum harvestable forage which could have been used by the Hopi Tribe (and hence, which may have been lost grazing opportunity). The evidence at trial shows that since 1979 Hopis have grazed only cattle and there was no evidence that they intend to graze sheep or goats. Although the Hopis argue that they should be able to choose how to use their land, they have already made that choice by grazing only cattle. The estimate of the Hopis' lost grazing opportunity, and hence the damages to be assessed against the Navajo Nation and/or the government, should be based on evidence of actual practices when it is available. The Court finds that the fully restored, harvestable forage at 75% excellent condition on the HPL is 12,191 AUs or 146,292 AUMs.

II. When will the HPL reach its fully restored condition?

The Court must also determine at which year the HPL will reach its fully restored condition. The Hopis are entitled to damages for lost grazing opportunity for each year from the date of partition until the HPL is fully restored.

Dr. Box testified that he established a rate of recovery for the HPL, based on actual grazing capacities (safe stocking rates) in 1963, 1973, and 1983,[13] and rainfall during that period.[14] His recovery calculations are presented on Table 11 of his report. *See* Ex. 1 (table 11), or Ex. 1B. The other parties, including the Navajo Nation, have accepted his calculations for rate of recovery. The parties do differ, however, on the level to which the range can be restored, and hence come up with different dates by which the range will be fully restored.

Dr. Box concluded that the fully restored grazing capacity of the HPL is 23,582 AUs, and would be fully restored in the year 2020. Gene Price concluded that the fully restored carrying capacity of the HPL is 9,046 AUs,

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[13] The BIA calculated the safe stocking rate (the actual grazing capacity) of the HPL at 37,443 AUMs in 1963. In 1973, that had fallen to 27,288 AUMs. Dr. Box testified that after 1973, the safe stocking rate further declined for a few years until the stock reduction programs of 1976 began. The safe stocking rate had increased to 68,224 AUMs by 1983.

[14] Dr. Box testified that there were no extremes in rainfall from 1973-1983. The rainfall from 1973-1977 was normal, and from 1977-1983 was high. From 1983-1992, Dr. Box assumed that in a wet year the range would recover at the same rate as 1977-1983, and in an average year would recover at 75% of that rate. From 1992-2020, Dr. Box averaged the recovery rates.

or 108,552 AUMs, which has been reached. Price arrived at the carrying capacity by assigning grazing capacities, in AU/section, to various range classifications,[15] and by multiplying those grazing capacity values by the number of sections in each range classification.

This Court accepts George Knoll's conclusion that the fully restored (harvestable) grazing capacity of the HPL at 75% excellent condition is 12,191 AUs or 146,292 AUMs. Applying Dr. Box's restoration rate, this level of grazing capacity would be reached between 1994 and 1995.[16]

III. What is the amount of lost grazing opportunity?

To determine how much grazing capacity was lost to the Hopi Tribe each year, the Court must determine the

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[15] Price collapsed the SCS range site categories into semi-desert grasslands, intermediate mixed grasslands, pinon-juniper woodlands, and unusable land. He testified that the SCS categories are more specific than necessary for appraisal work.

[16] It is permissible to utilize Dr. Box' table for the restoration rate, despite the fact that Knoll's fully restored grazing capacity reflects site association, accessibility, and water availability cuts. This is because Dr. Box's "Safe AUYs" calculations (the safe stocking rate) are based on the 1983 BIA calculation of safe stocking rates, which also included cuts for unharvestable forage. The Court is thus comparing "like things" when it compares Dr. Box's calculations of safe stocking rates with Knoll's calculation of fully restored grazing capacity in order to arrive at a lost grazing capacity figure.

Utilizing a different method to calculate the restoration rate, Knoll opined that the HPL would be restored between the years 1998 and 2000. Because all parties accepted Dr. Box's restoration rate, the Court utilizes Dr. Box's table.

actual grazing capacity for each year after partition, and what part of that lost grazing capacity would have been utilized by the Hopi Tribe.

The actual grazing capacity for the years 1979-1995 (the year at which the range will be fully restored) are listed on Dr. Box's restoration rate table. *See* Ex. 1 (table 11) or Ex. 1B. Using the fully restored value of 12,191 AUs, the Hopi Tribe lost 70,509 AUs or 846,108 AUMs of grazing capacity from 1979-1992. From 1993-1995, the Hopi Tribe will lose 1813 AUs or 21,756 AUMs of grazing capacity.[17] The total lost grazing opportunity from 1979-1995 is 72,322 AUs or 867,864 AUMs.

However, the Court must decide whether reductions in lost grazing opportunity should be made for the Hopis' choice not to graze livestock on seven range units. In order to conduct the range restoration and improvement programs mandated by the Settlement Act, the BIA must obtain the concurrence of the Hopi Tribe. *See Hopi Tribe v. Watt*, 530 F.Supp. 1217 (D.Ariz. 1982), *aff'd*, 719 F.2d 314 (9th Cir. 1983) (concurrence of the Hopi Tribe necessary for the performance of conservation and range activities on the HPL, except as required to protect the rights of Navajos awaiting relocation). George Knoll and Tom Davis testified that the Hopi Tribe decided to remove range units 252, 253, 254, 260, 261, and 263 from their grazing program and utilize this land for forest and wildlife reserve; no fences or water developments were installed on these units.

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[17] The lost grazing capacity for 1993-1995 is expressed separately, as that value must be reduced to present value.

The government argues that the defendants should not be assessed damages for lost grazing opportunity on ranges which in fact were not and will not be grazed by the Hopi Tribe, nor will be leased to other individuals to graze. The Hopi Tribe argues that it should not be penalized for deciding not to use part of its land for grazing, and that the actual use of the land is irrelevant in determining damage to the land.

This Court is not determining damage to the HPL in the abstract, but is determining the lost grazing opportunity to the Hopi Tribe due to overgrazing by Navajos. Because evidence at trial established that the Hopis have not and will not graze these range units, and hence have not and will not suffer any real injury for a low grazing capacity on that land, this Court will subtract the lost grazing opportunity associated with the seven unused range units.

George Knoll calculated the potential (fully restored) grazing capacity of the seven range units to be 62,599 AUMs, or 30,108 AUMs (2509 AUs) after reduction for site association, accessibility, and water availability. *See* Ex. 2302, p. 9. This represents 16.9% of the entire harvestable potential grazing capacity of the HPL at 100% excellent condition (178,373 AUMs after reduction for site association, accessibility, and water availability).[18] The

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[18] In his report, George Knoll calculated the seven range units to be 22.1% of the potential carrying capacity of the HPL. While this is correct, the seven range units are only 16.9% of the *harvestable* potential carrying capacity.

harvestable fully-restored grazing capacity at 75% excellent condition (146,301 AUMs or 12,191 AUs) will thus be reduced by 16.9% to 121,576 AUMs or 10,131 AUs.

The Court will determine the lost grazing capacity attributable to the seven unused range units, and subtract that figure from the lost AUMs for the entire range.[19] For 1979-1992, the lost grazing capacity of the seven range units is 11,909 AUs (142,908 AUMs), and for 1993-1995, 305 AUs (3660 AUMs), as shown in the following table:[20]

Year	Safe AUs	Potential AUs	Loss in AUs
1979	505[21]	2060	1555
1980	619	2060	1441
1981	733	2060	1327
1982	847	2060	1213
1983	961	2060	1099
1984	1075	2060	985
1985	1189	2060	871

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[19] The Court assumed that the unused range units represented 16.9% of the safe stocking rate for the entire range from 1979-1985 (because they were 16.9% of the harvestable potential grazing capacity). The safe stocking rates for the unused range units (Safe AUs) were then subtracted from the harvestable fully-restored grazing capacity at 75% excellent condition of the seven range units (Potential AUs), of 24,725 AUMS or 2060 AUs.

[20] Very similar results are achieved by subtracting 16.9% of the lost AUs/AUMs for the entire range. Under this calculation, the lost grazing capacity of the seven range units from 1979-1992 is 11,916 AUs (142,992 AUMs), and from 1993-1995 is 306 AUM (3672 AUMs).

[21] 1979 calculations: 2987 (safe stocking rate for HPL) x .169 = 505. 12,191 (potential for HPL) x .169 = 2060.

1986	1303	2060	757
1987	1417	2060	643
1988	1531	2060	529
1989	1588	2060	472
1990	1645	2060	415
1991	1702	2060	358
1992	1816	2060	244
		Total:	11,909 AUs
1993	1901	2060	159
1994	1987	2060	73
1995	2072	2060	73 (lost until fully-restored)
		Total:	305 AUs

The Hopi Tribe will receive damages for 58,600 AUs (703,200 AUMs) from 1979-1992, and 1508 AUs (18,096 AUMs) from 1993-1995, for a total of 60,108 AUs, or 721,296 AUMs lost grazing opportunity. (The value of the lost AUs for 1993-1995 will be reduced to present value).[22]

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[22] For purposes of determining the *date* at which the HPL was fully restored, the Court did not reduce the figure for the harvestable fully-restored grazing capacity at 75% excellent condition (146,292 AUMS) by the percentage of grazing capacity on the unused range land; this would artificially decrease the time the entire range would require to reach its fully restored capacity.

IV. What is the value of the lost grazing opportunity?

Dr. John Workman, a range economist,[23] testified on behalf of the Hopi Tribe regarding the value of the lost grazing opportunity. To arrive at an appropriate lease rate for the lost AUMs, Dr. Workman utilized data of average Arizona private grazing lease fees published by the Agricultural Statistics Service. Because there was no data on Arizona grazing leases for 1984, 1985 and 1990, Workman used Agricultural Statistics Service lease data from the Mountain States (which have a higher lease rate), and corrected for the average percentage difference between average Arizona and Mountain States grazing lease fees (.67). He then projected the estimated 1990 fee into the future.

Dr. Workman testified that he had not investigated the specifics of the Arizona grazing leases included in the Agricultural Statistics Service data, such as the acreage of the leased land, the grazing capacity of the land, or whether those leases included services such as fencing, water maintenance, residences, corrals, or other improvements. Workman testified that it was not necessary to determine the specifics of the comparables, since the data he used was a statistical average of a large sample of all Arizona grazing leases.

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[23] Dr. John workman is a Professor of Range Science at Utah State University and a Certified Range Management Consultant. He has taught and conducted research in range economics for 22 years, and has written a textbook and a number of articles on the topic. *See* Ex. 57 (report); Ex. 20, appendix (resume).

Workman also testified that because the services provided in the private leases found in the Agricultural Statistics Service are generally not comparable to those services provided on the HPL, some adjustment to the average Arizona grazing lease fee was necessary. He testified that private leases generally include services (such as construction and maintenance of fences and water facilities and supervision of livestock) and decreased livestock operating costs (such as no grazing association fees, smaller pasture size leading to smaller roundup costs and fewer lost animals, and less distance to base property which lowers supervision and transportation costs). Dr. Workman testified that grazing lease rates with no services are 30% lower than the private lease rates.

Dr. Workman testified that some of the services listed above are not available on the HPL, such as care and supervision of livestock, fence and water maintenance, and range improvements, but that some services are available on the HPL, such as boundary and cross-fencing, water construction (vs. maintenance), and proximity of foraqe to the residence; he thus reduced the private grazing lease rates by 15%. These fees, reduced 15%, varied from $2.15 to $6.11 per AUM.[24]

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[24] Dr. Workman calculated the grazing fees as follows: $3.94 (1979), $3.86 (1980), $4.76 (1981), $2.15 (1982), $6.03 (1983), $5.04 (1984), $4.79 (1985), $4.95 (1986), $6.11 (1987), $3.80 (1988), $3.33 (1989), and $4.95 (1990). He then used $4.95 for 1991-2020 to calculate the total amount due. *See* Ex. 57 (report), Tables 1 and 2.

On cross-examination, the Navajo Nation showed Dr. Workman evidence that the Navajo Nation had constructed some of the water facilities on the HPL. *See* Ex. 2391.a.1 (Vol II. of Mediator's report) (Navajo Nation funded the construction of many wells and springs on the JUA). Further, Dr. Workman admitted that he did not know how much fencing was on the HPL after partition. Dr. Workman agreed that if services were provided by the Navajos for their own use, his percentage of the private lease rate would decrease, but not to the full 30%.

Gene Price testified on behalf of the Navajo Nation regarding the appropriate lease rates for AUs/AUMs.[25] To arrive at a lease rate for the damage case, he relied on the methodology he employed in the "use" case (rental for Navajo grazing from 1962-1979). Price utilized land holding company leases, which he testified were most comparable to the JUA (prior to partition), since no services were provided on the JUA (there was little fencing and Navajos maintained the water facilities). Price testified that after 1979 more fencing was provided on the HPL and the Navajo Nation no longer maintained the water facilities; he thus adjusted the land holding company lease rates upward by 25%. Price's lease rates after adjustment varied from $2.00 to $2.90 per AUM.[26]

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[25] Gene Price did not do a report for the damage case, but his rental calculations appear in Ex. 295 (Price report in use case). His calculations for the damage case appear at Ex. 200.1a.

[26] Price used the following lease rates: $2.90 (1979), $2.50 (1980), $2.00 (1981 – 1984), $2.45 (1985 – 1989), $2.50 (1990 – 1992). His calculations stop at 1992, since he is of the opinion that the HPL is now fully restored.

Arvel Hale, Chief Real Estate Appraiser for the BIA,[27] used the grazing lease rates found on the "MacGregor Range", federal land in southern New Mexico open for public bid each year. Hale testified that the MacGregor Range has similar services to the HPL, since the HPL has water and some range improvement. Unlike most federal grazing permits, the MacGregor permits have no leasehold value and are issued for only one year. The average of the fees from 1979-1991 was $5.34; Hale projected this rate into the future. Mr. Hale testified that he did not use private lease comparables, since the lease rates varied widely, from $2 to $20 per AUM.

Dr. John Fowler, a range economist from New Mexico State University, testified in rebuttal on behalf of the Navajos.[28] He opined that the lease rates for the MacGregor Range were inflated because a floor of $4/AUM was in place. Further, Dr. Fowler stated that the MacGregor rates were especially high in 1984-1985 during a drought period when many ranchers bid higher for grazing land to save their genetic brood herd. He also testified that the value of the forage (without services) on the MacGregor Range was $1.99/AUM in 1990. However, this Court will include the value of services on the HPL, since that represents the lease rate the Hopis could have enjoyed had the HPL been fully restored.

The Court will adopt Dr. Workman's approach to valuing the lost AUMs. The use of average private lease rates is reasonable when reductions are taken to account

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[27] Arvel Hale's report in the damage case is Ex. 2353.

[28] *See* Ex. 291 (report); Ex. 334.1d (resume).

for fewer services on the HPL. Since partition, Navajos have not provided range management services such as fence and water maintenance on the HPL. Fencing and other range improvements are being constructed by the government pursuant to the Settlement Act, and are now 90% complete. Some of the services generally provided by private lease arrangement, however, will not be available on the HPL, such as supervision of livestock. A reduction of the private lease rates by 15% is reasonable. Dr. Fowler testified that the value of forage, without services, for New Mexico private leases was $4/AUM. Since the HPL has some services available, Dr. Workman's values are reasonable at an average of $4.47/AUM.

However, the 1990 lease rate of $4.95 will not be projected for each year until restoration. Instead, the Court will use the average of the 1979-1990 prices to account for the fluctuation of private lease rates, and will utilize $4.47 per AUM (or $53.64 per AU) from 1991-1995.

The following table indicates the amount of damages the Hopi Tribe will be awarded for each year of lost grazing opportunity.

Year	Lost AUs	Lease rate per AU	Damages
1979	7649[29]	$47.28[30]	$361,644.72
1980	7088	$46.32	$328,316.16
1981	6528	$57.12	$372,879.36
1982	5967	$25.80	$153,948.60
1983	5407	$72.36	$391,250.52
1984	4846	$60.48	$293,086.08
1985	4286	$57.48	$246,359.28
1986	3725	$59.40	$221,265.00
1987	3165	$73.32	$232,057.80
1988	2604	$45.60	$118,742.40
1989	2324	$39.96	$ 92,867.04
1990	2044	$59.40	$121,413.60
1991	1764	$53.64	$ 94,620.96
1992	1203	$53.64	$ 64,528.92
1993	782	$53.64	$ 41,946.48
1994	363	$53.64	$ 19,471.32
1995	363[31]	$53.64	$ 19,471.32
Total	60,108 lost AUs		$3,173,869.56

[29] 1979 calculations:

9204 lost AUs for entire HPL (12,191 AUs fully restored grazing capacity – 2987 safe AUs from Box table 11)

1555 lost AUs for seven ungrazed range units (*from calculations in Section III of this order*)

7649 lost AUs, for which the Hopi Tribe is entitled to damages.

[30] Dr. Workman's lease rates were reported on a $/AUM basis. His rates will be multiplied by 12 to calculate a $/AU lease rate. From 1991-1995, this Court will use $4.47/AUM.

[31] Since the range will be fully restored sometime in 1995, the lost AUs for 1995 are the fully restored capacity (12,191 AUs) – the safe AUs at the beginning of 1995 (11,755 AUs), or 363 AUs lost grazing capacity.

From 1979-1992, the Hopi Tribe is entitled to $3,092,980.44 in damages for lost grazing opportunity. From 1993-1995, the Hopi Tribe is entitled to $80,889.12 in damages, which will be reduced to its present value, in accordance with the following discussion.

V. What is the appropriate discount rate for the future damages?

Dr. Workman opined that a discount rate of 4.2% should be used to calculate the present value of the stream of future damages. He utilized the real interest rate for Arizona ranch mortgages for January, 1992 (9%), subtracting 4.81% expected inflation.

Dr. Herbert Kaufman, Chairman of the Finance Department in the College of Business at Arizona State University, was called as a rebuttal witness by the Navajo Nation.[32] He opined that Dr. Workman did not use the appropriate methodology to arrive at a discount rate: Dr. Workman used mortgage interest rates from one month only (January, 1992), subtracted the average rate of inflation for 1990-1991 (instead of the inflation rate for January, 1992), and failed to adjust for taxes.

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[32] The Navajo Nation's use of Dr. Kaufman to testify about the discount rate is an example of the excessive expenses spawned by this litigation. Dr. Kaufman testified that he was paid $200 per hour, and worked for a total of about 250 hours; some of this work was determining an appropriate fully restored carrying capacity for the HPL, a topic entirely outside of his expertise. In effect, Dr. Kaufman was paid about $50,000 to testify regarding the appropriate discount rate.

Dr. Kaufman was of the opinion that the appropriate discount rate is 13.5%. Dr. Kaufman utilized the average of the operating capital borrowing rate from 1979-1991 (the prime rate plus 2%). *See* Ex. 165 (table of operating capital borrowing rates from 1979-1991). He testified that he used this rate because it is short-term, and reflects the risk inherent in ranching operations. Further, Dr. Kaufman testified that he did not reduce the rate for inflation because grazing fees move up and down over the business cycle.

Arvel Hale testified for the government that the appropriate discount rate is 8.9%, the earnings on tribal trust fund accounts. This is the rate of interest the Hopi Tribe will actually earn on the damages from this case, and will bs employed by the Court.

The present value of the damages for lost grazing opportunity for 1993-1995, $80,889.12, reduced to its present value is $74,408.40. The total damages due the Hopi Tribe is $3,167,388.84.

VI. Is the Navajo Nation entitled to an offset for post-partition rental payments to the Hopi Tribe?

Section 16 of the Settlement Act, 25 U.S.C. § 640d-15, directed that the Navajo Nation to pay the Hopi Tribe the fair rental value for all use by Navajo individuals of the HPL subsequent to the date of partition, to be determined by the Secretary of Interior.[33]

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[33] Section 640d-15(b) also provided for rental payments to the Navajo Nation for use by Hopis of the NPL. However, the

In 1985, the Hopi Tribe brought an action to compel the Secretary to determine the fair rental value since partition and to collect such rent from the Navajo Nation. *See* CIV 85-801 PHX EHC. After the Secretary determined the fair rent due for grazing from 1979-1984, the Navajo Nation brought an action for judicial review of the rental determination. *See* CIV 87-1966 PHX EHC. These actions were consolidated. Subsequent determinations were made by the Secretary for homesite and farmland rental for 1979-1984, and for grazing, homesite and farmland rental for 1985. The Navajo Nation sought judicial review of these administrative determinations, as well, and they were included in the above-captioned cases.

On July 2, 1992, this Court upheld the Secretary's rental determination for grazing from 1979-1984, holding that this Court did not have jurisdiction to review the administrative determination of those grazing rental payments because the Navajo Nation had failed to timely appeal, and thus failed to exhaust its administrative remedies. The amount of judgment was $1,186,190.77, minus a previous payment of $459,841.84, for a total of $726,348,93. This partial judgment was appealed by the Navajo Nation on October 8, 1992 and cross-appealed by the Hopi Tribe on October 12, 1992.

This Court also upheld the Secretary's homesite rental detormination for 1979-1984, and entered partial judgment in favor of the Hopi Tribe in the amount of $586,803.60. This partial judgment was appealed by the

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few Hopi tribal members located on the NPL moved shortly after partition, and there is no claim for rent by the Navajo Nation.

Navajo Nation on August 5, 1992, and cross-appealed by the Hopi Tribe on August 14, 1992. The Court remanded the farmland rental determination ($191,671.14) to the BIA to conduct a more thorough analysis of the price of Indian corn, to develop more reliable yield data, and to exclude the number of acres properly allowed to lie fallow each year.

For 1985 rental payments, the Secretary determined that all issues relating to rental payments had been previously litigated and therefore had preclusive effects, and determined that $236,705.38 was due for grazing, homesite, and farmland use in 1985. This Court remanded the entire 1985 rental determination, and directed the BIA to consider whether homesite rental had been assessed for farm tracts and to conduct a more thorough analysis of farmland rental (as addressed in the previous paragraph). The grazing rental determination was remanded for the BIA to consider whether incorrect adjustments had been made to the "Burke Hansen" appraisal, and whether grazing fees paid to the Hopi Tribe offset the grazing rental obligations.

The Navajos argue that the grazing rental payments should offset some of the damages awarded to the Hopi Tribe in this case. They contend the maximum amount of damages to which the Hopi Tribe is entitled is the rental value of the fully restored grazing capacity, as this is the maximum value the Hopis would have received had they been partitioned a fully restored range in 1979. The Navajo Nation argues that the post-partition rental payments, plus the damage award, exceeds the rental rate for the fully restored grazing capacity, and is thus double-recovery.

Gene Price testified that the total amount of overpayment equals $2,671,985. *See* Ex. 200.1b. He arrived at that figure by adding his calculation of damages due the Hopi Tribe for lost grazing opportunity (using his rental value and estimate of when the HPL would be fully restored) and the amount of post-partition rental payments assessed by the Secretary of Interior against the Navajo Nation, and comparing that figure against the total potential rent from his estimate of a fully restored HPL.[34] If this Court followed Price's method of calculating overpayment using the figures this Court has determined are appropriate for grazing lease fees and the fully restored grazing capacity of the HPL, there is no "overpayment", as shown in the following table.

Year	Damages for lost grazing	Post-partition rent assessed	Total Rent Fully res.	Amount "Overpaid"
1979	$361,644.72	$197,698.46[35]	$478,993.68[36]	
1980	$328,316.16	$197,698.46	$469,267.92	
1981	$372,879.36	$197,698.46	$578,682.72	

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[34] Price also added the amount of grazing "available to the Hopi Tribe"; i.e. the value of the grazing on the HPL not used by Navajos, to the amount of overpayment. *See* Ex. 200.1b. The reasoning for this approach was not convincing and is rejected.

[35] In Ex. 200.1b, Price used a rental payment of $1,964,666 for 1979-1984. The actual *grazing* rental payment affirmed by the Court was $1,186,190.77 (the remaining amount is homesite and farmland rent). $197,698.46 is 1/6 of that amount.

[36] To calculate the total rent due for a fully restored range, the Court applied Dr. Workman's rental rate ($/AU) as contained in the previous table, and multiplied by 10,131 AUs, the fully restored grazing capacity of the HPL minus the unused range units. For example, the total rent due for a fully restored range minus the seven unused range units in 1979 would be $47.28/AU x 10.131 AUs = $478,993.68.

1982	$153,948.60	$197,698.46	$261,379.16
1983	$391,250.52	$197,698.46	$733,079.16
1984	$293,086.08	$197,698.46	$612,722.88
1985	$246,359.28	$101,395.08[37]	$582,329.88
1986	$221,265.00	$ 95,316.30[38]	$601,781.40
1987	$232,057.80	$ 73,850.40	$742,804.92
1988	$118,742.40	$ 65,698.20	$461,973.60
1989	$ 92,867.04	$ 59,888.70	$404,834.76
1990	$121,413.60	$ 51,333.30	$601,781.40
1991	$ 94,620.96	$ 42,750.00[39]	$543,426.84
1992	$ 64,528.92	$ 33,750	$543,426.84

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[37] The 1985 rental determination attributable to grazing was $101,395.08; the figure used by Price, $226,204, included rent charged for homesite and farmland use. As stated above, the 1985 grazing rental determination was remanded to the BIA for reconsideration of a few issues, and the final amount of grazing rental may change. The use of the $101,395.08 is not intended to express the opinion of this Court on the validity of that amount.

[38] The $211,814 figure used by Price for the 1986 rental payment obviously includes grazing, homesite, and farmland rental payments. No evidence was introduced regarding the amount attributable to grazing. For purposes of this discussion, the Court assumes that the grazing rental constituted 45% of the total rental payment for 1986-1990, as was seen in the 1985 rental determination ($101,395.08/$226,204). Further, there is no evidence before the Court regarding whether the 1986-1990 rental determinations are final, or subject to review by this Court.

[39] Price estimated that $95,000 in rental payments would be assessed for 1991 based on "historical relocation rates", although the rent has not yet been determined by the BIA. For purposes of this discussion, the Court used Prices' projections, and designated 45% of that number for grazing rental.

1993	$ 41,946.48	$ 27,000[40]	$543,426.84	
1994	$ 19,471.32	$ 21,600	$543,426.84	
1995	$ 19.471.32	$ 17,280	$543.426.84	
Total	$3,173,869.56	$1,776,052.74	$9,246,766.32	$0

However, the method used by Price to determine whether there has been double-counting, i.e. comparing the *money* values for damages due the Hopi Tribe for lost grazing opportunity, postpartition rent, and rent due for a fully restored range, is incorrect because it overvalues any amount of double counting. The Navajos were assessed "penalties" in the post-partition rental determinations for trespassing livestock, which was affirmed by this Court on review of the administrative determination. If this Court were to reduce the amount of damages owed to the Hopi Tribe in this case simply based on the amount of money paid in the postpartition rental determinations, it would in effect reduce the amount of postpartition rent by collateral attack.

Instead, the Hopi Tribe established the proper approach to determine if there was double counting is to look at the number of AUs/AUMs for which the Navajos are assessed damages in this case, the number of AUs/AUMs for which the Navajos were assessed postpartition

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[40] Because Price only projected the post-partition rental payments to 1992 (the date which he opined the HPL would be fully restored), the Court projected the rental payments to 1995 by decreasing the rental payments by 20% per year (a very general trend in the figures up to 1992). Again, the Court attributed 45% of the projected figures to grazing rental for 1993-1995.

rental, and see if those numbers exceed the number of AUs/AUMs on a fully restored range.[41]

In conclusion, the Court finds that there was no double-counting between the post-partition rental payments and damages for lost grazing opportunity.

VII. How much of the Hopis lost grazing opportunity was caused by Navajos?

The Court concludes that the damage to the HPL range, and hence the Hopi lost grazing opportunity, was due in very large part to the overgrazing of Navajo livestock.

Dr. Box testified that his examination of historical records showed that the range had been in poor condition since the 1930's, and that there were a large number of Navajo livestock on the JUA since the 1930's until livestock reduction. The Navajos admit that the JUA was overgrazed prior to partition.

Indeed, court orders were required to force the Navajos to reduce the number of livestock on the JUA. In 1972, the District Court issued an order of compliance ordering the Navajo Nation to commence reduction of the

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[41] Applying this approach on cross-examination using Price's numbers, the Hopi Tribe established that there is no double-counting. Price estimated that in 1985, 46,356 AUMs were lost (*see* Ex. 200.1b), the Navajos were charged rent for 10,029 AUMs (*see* Ex. 337), for a total of 56,385 AUMs. Price estimated that the fully restored grazing capacity is 108,552 AUMs; the Navajos were not charged for the use or loss of more than the fully restored capacity.

livestock on the JUA to one-half of the carrying capacity within one year, and cancelling all prior grazing permits. *Hamilton v. MacDonald*, CIV 58-579 (October 14, 1972), *aff'd, Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974) ("The district court found that members of appellant Tribe have so extensively overgrazed the range that 80 per cent of the joint use area is producing only 0 per cent to 25 per cent of its maximum forage, and that the range is still deteriorating. That condition constitutes waste.")

On May 29, 1974, the District Court held the Navajo Nation, and then Chairman Peter MacDonald, in contempt for their refusal to reduce the number of livestock on the JUA. The District Court's Findings of Fact recitedthat the Navajos estimated that there were 120,000 Sheep Units on the JUA in 1972. *See Sekaquaptewa v. MacDonald*, 544 F.2d 396 (9th Cir. 1976) (affirming contempt citation).

In the District Court's May 12, 1977 Findings of Fact in support of the judgment of partition, the District Court found, "As of April 7, 1977, the number of animals grazed on the joint use area was not less than 70,000 sheep units year long and might have been as great as 129,000 sheep units year long." *See Sekaquaptewa v. MacDonald*, CIV 58-579 PCT (JAW) (May 12, 1977, Finding #3). Clearly, Navajo livestock vastly exceeded the carrying capacity of the JUA for many years prior to partition.

Moreover, Dr. Box testified that there was no evidence of abnormal numbers of wild animals, no evidence of Hopi overgrazing, and no extreme climatic changes during this time period. This was not contradicted by the Navajo Nation. In fact, an expert report introduced by the

Navajo Nation demonstrates that there were no severe climatic conditions from 1960 to the present.[42] From about 1960-1979, the rainfall centered around normal (though it was somewhat below normal on the Palmer Hydrological Drought Index for 1960-1975). Moisture increased from the mid-70's to the late 80's, 1988-1990 was drier than normal, and 1991-1992 had well above normal rainfall. *See* Ex. 294 (Dr. Robert Balling, Jr., Office of Climatology, Arizona State University).

This Court finds that the damage suffered by the Hopi Tribe in the form of lost grazing opportunity was caused by the overgrazing of Navajo livestock.

VIII. Should the government be held liable for any of the damage to the HPL and should it indemnify the Navajo Nation for its liability?

The Hopi Tribe and the Navajo Nation argue that the government should also be held liable for damage to the HPL because it failed to control Navajo overgrazing. The government argues that it did everything it could do to reduce the amount of livestock on the JUA and the HPL, but encountered resistance by the Navajo Nation and individual Navajos which greatly hindered the government's efforts.

Evidence at trial shows that the government was conscientious – given interference by Navajos – in its

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[42] Since the Hopis are claiming lost grazing opportunity from 1979 until the HPL is fully restored, the weather conditions before 1960 are not relevant to this Court's consideration of the cause of temporary damage to the land in 1979.

attempts to reduce the amount of Navajo livestock on the HPL. C. Ray Smith, who has worked for the BIA for 29 years and was actively involved in grazing control on the HPL from 1981 until 1984, testified that the BIA encountered intense resistance to livestock reduction from Navajo individuals who remained on the HPL, and that the majority of Navajos did not comply with grazing regulations. He was personally threatened a number of times, firearms were twice used to retrieve animals from impoundment corrals, and two BIA employees were physically assaulted. Further, Smith testified that the Navajo Nation resisted implementation of livestock reduction plans; officials with the Navajo Nation repeatedly requested the BIA to cease impoundment of non-permitted animals, and the Navajo Nation often paid the impoundment fees for individuals.

Tom Davis, a range conservationist for the BIA since 1974, also had an active part in the enforcement of grazing regulations on the HPL after partition. Davis confirmed that BIA employees were threatened and encountered resistance in their activities; in fact, Davis required a personal bodyguard for six months in 1981. Davis also confirmed that the Navajo Nation did not assist the BIA in its effort to regulate grazing on the HPL and often paid impoundment fees for its members.

The Hopi Tribe has not sustained its burden of proof to establish that the damage to the HPL was caused by unreasonable government action or inaction. The evidence instead demonstrates that but for Navajo overgrazing, and Navajo resistance to the government efforts at range restoration, livestock reduction and relocation, the HPL would not have been damaged.

Moreover, the government will not be required to indemnify the Navajo Nation for any part of its liability. The Navajo Nation has not established that the government violated a trust responsibilityto the Navajo Nation. Any failure by the government to control Navajo grazing (which has not been proven) conferred a benefit upon the Navajo individuals who were allowed to graze more animals than otherwise permitted.

CONCLUSIONS OF LAW

This Court has jurisdiction pursuant to Section 18 of the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d-17(a)(3), 88 Stat. 1714, P.L. 93-531 (1974). Section 640d-17(a)(3) authorized the Hopi Tribe to bring an action against the Navajo Nation and the United States for damage to the Hopi Partitioned Lands (the "HPL").

Sections 640d-5(d) and 640d-17(a)(3) waive the sovereign immunity of the United States if the government failed "to provide protection [for the HPL] where such protection is or was required by law or by the demands of the trust relationship".

The temporary damage to the HPL[43] is measured by the lost grazing opportunity to the Hopi Tribe for each year the Hopi Tribe is deprived of the use of a fully restored range from the date of partition until the range is expected to reach its fully restored state. "Fully restored" means restoration "to the maximum extent feasible", as utilized in 25 U.S.C. § 640d-18(a). Based on evidence at

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[43] The Hopi Tribe did not argue that there was any permanent damage to the HPL.

trial, the HPL is fully restored when it reaches 75% excellent condition, as defined by the BIA.

Reduction to the fully restored grazing capacity are necessary for "site association", "accessibility", and "water availability" problems to account for that amount of forage that could not be harvested by Hopi cattle.

If Hopi livestock could not harvest all of the forage onthe HPL, the Hopis have not suffered lost grazing opportunity as to that amount of forage.

Reductions are also necessary to reflect the Hopi Tribe's choice not to graze livestock on seven range units on the HPL. Because the Hopis have not and will not graze livestock on these range units, they have not and will not suffer any injury from a grazing capacity below potential.

The Court concludes that the damage to the HPL range, and hence the lost grazing opportunity to the Hopi Tribe, was caused by the overgrazing of Navajo livestock. Court orders were required to force the Navajos to reduce the number of livestock on the JUA, see *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974), and the Navajo Nation and its Chairman were held in contempt for their refusal to comply. *See Sekaquaptewa v. MacDonald*, 544 F.2d 396 (9th Cir. 1976).

The Hopi Tribe has not sustained its burden of proof to establish that the damage to the HPL was caused by unreasonable government action or inaction, and the government will not be held liable to the Hopi Tribe.

The government also will not be required to indemnify the Navajo Nation for any part of its liability, as the

Navajo Nation Nation as to the Navajo Nation's cross-claim for indemnity.

DATED this 18th day of December, 1992.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

VERNON MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe, Plaintiff, v. PETERSON ZAH, Chairman of the Navajo Tribal Council of the Navajo Indian tribe, for and on behalf of the Navajo Indian Tribe, Defendant.	CIV 76-936 PHX EHC FINDINGS OF FACT and CONCLUSIONS OF LAW and ORDER re: USE CLAIM (Filed Jan. 15, 1993)

INTRODUCTION

Plaintiff Vernon Masayesva is the duly authorized Chairman of the Hopi Tribal Council of the Hopi Tribe, and appears herein as representative of the Hopi Tribe and its villages, clans and individual members.

Defendant Peterson Zah is the duly authorized Chairman of the Navajo Tribal Council, and appears herein as representative of the Navajo Nation[1] and its chapters, clans, and individual members.

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[1] The Navajo Tribal Code, 1 N.T.C. § 301, requires officials of the Navajo Tribe to use the term "Navajo Nation" rather than "Navajo Tribe". Throughout this opinion, the Court will use the term employed by the Navajos.

This is a suit brought by the Hopi Tribe pursuant to Section 18 of the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d-17(a)(2), 88 Stat. 1714, P.L. 93-531 (1974) ("the Settlement Act") against the Navajo Nation for payment of one-half the value of Navajo grazing and agricultural use of the Joint Use Area ("JUA") from September 28, 1962 – April 18, 1979, together with 6% interest compounded annually.[2] The Federal Government is not a party to this action.

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[2] 25 U.S.C. § 640d-17 provides, in relevant part:

(a) *Authorization to commence and defend actions in District Court*

Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 640d-2 or 640d-3 of this title:

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> (2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands.

This language could also be interpreted as requiring payment by each tribe for grazing and agricultural use beyond its one-half interest on the JUA. Neither party urged this interpretation, however, and this Court will utilize the parties' interpretation that the Navajo Nation is liable to the Hopi Tribe for one-half of the value of all Navajo use of the JUA. Given the extensive use of the JUA by the Navajos, the different interpretations of the statute may not result in different valuations.

In 1958, Congress authorized litigation to settle title to the 1882 Reservation. *See* 72 Stat. 403, P.L. 85-547 (1958). In 1962, a three-judge District Court held that the Navajo and Hopi Tribes had an undivided and equal interest in the 1882 Reservation outside the boundaries of land management district 6 ("District 6") which was exclusively occupied by Hopis. *Healing v. Jones*, 210 F.Supp. 125, 191-92 (1962), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963) (per curiam). This area of undivided and equal interest was called the Joint Use Area or "JUA". When joint use by both Navajos and Hopis proved unworkable, *see Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972); *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974); *Sekaquaotewa v. MacDonald*, 544 F.2d 396 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977), Congress passed the Settlement Act and authorized partition of the JUA (after a mediated negotiation effort by the tribes). After negotiation failed, the District Court partitioned the JUA. Partition was final on April 18, 1979.

The Settlement Act also authorized a number of actions for money damages. 25 U.S.C. § 640d-5(d) authorized a suit for "owelty"[3] payments by either tribe; the Hopi Tribe claims that it received a less valuable portion of the JUA in partition and is therefore entitled to

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[3] Owelty is "a sum of money paid by one of two coparceners or cotenants to the other, when a partition has been effected between them, but, the land not being susceptible of division into exactly equal shares, such payment is required to make the portions respectively assigned to them of equal value." *Black's Law Dictionary* (4th ed).

payments to equalize the value. *See* CIV 58-579 (supplementary proceedings). Section 640d-15 provided for rental payments for use of the Hopi Partitioned Lands (HPL) and the Navajo Partitioned Lands (NPL) by members of the other tribe from the date of partition until relocation is completed. *See* CIV 85-801. Section 640d-17(a)(1) authorized an action for an accounting of sums collected by either tribe since 1957 for trader license fees, lease proceeds, or other charges for doing business on the JUA, and the payment of one-half of those sums to the other tribe; this suit was settled. *See* CIV 76-935. Section 640d-17(a)(3) authorized a suit for damage to the HPL from Navajo overgrazing. Finally, Section 640d-17(a)(2) authorized the above-captioned action (the "use" case) for the recovery of one-half of the fair value of the grazing and agricultural use by either tribe between 1962 and the partition date; only the Hopi Tribe brought suit under this provision.

The "use" case was consolidated for trial with the owelty and damage cases, and was tried from July 28 – August 12, 1992. Separate findings and judgments will be issued in each case.

FINDINGS OF FACT

I. Fair value of Navajo grazing

There are two main issues which this Court must resolve to determine the fair value of Navajo grazing from September 28, 1962 – April 18, 1979. One, how should the amount of grazing be calculated? Two, what measure of value for that grazing should be used?

The amount of Navajo grazing

Both parties agree that the amount of grazing for which the Navajos should be charged is the amount of forage consumed by Navajo animals from 1962-1979. The parties disagree about how to measure the amount of forage consumed – the Hopis argue that the number of animals on the JUA reflects the amount of forage consumed, and the Navajos argue that the Bureau of Indian Affairs (BIA) estimates of grazing capacity should be used to calculate forage consumed.

The Hopi Tribe argues that the amount of rent should be based on the number of Navajo animals on the JUA from 1962-1979. Dr. John Workman[4] testified on behalf of the Hopis that he utilized information from BIA, Navajo, and court documents regarding the number of livestock on the JUA during this time. In years in which more than one amount of livestock was reported, Dr. Workman averaged all of the numbers for that year because he did not know which count was more accurate. He testified that the BIA counts were probably conservative due to the difficulty in obtaining accurate livestock counts in this large area. Further, Dr. Workman stated that BIA livestock counts would undervalue forage eaten because the BIA did not count young animals. It is likely that the vast

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[4] Dr. John Workman is a Professor of Range Science at Utah State University and a Certified Range Management Consultant. He has taught and conducted research in range economics for 22 years and has written a textbook and a number of articles on the topic. *See* Ex. 20 (report); App. to Ex. 20 (resume).

majority of animals counted by the BIA on the JUA belonged to Navajos, since court documents indicate that the Hopis grazed less than 1% of the animals on the range.

Dr. Workman then converted the livestock counts to Animal Unit Months (AUMs) to measure the forage consumed.[5] If the livestock numbers were reported in Animal Unit Years (AUs), he multiplied the numbers by 12. If the numbers were reported in Sheep Units Year Long (SUYL or SUs), Dr. Workman used a 4:1 ratio to convert the numbers to AUs (4 SU = 1 AU), and then converted the numbers to AUMs.[6]

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[5] The grazing capacity of a parcel of land can be expressed in AUMs or AUs. The AU value indicates how many 1000 lb. cows could graze on a parcel of land for one year. The AUM value indicates how many 1000 lb. cows could graze on that parcel if they were allowed to consume all of the forage in one month. (AU x 12 = AUM). The AU and AUM value represent the same amount of forage.

[6] Dr. Workman reported the following AUMs of forage were consumed, based on the numbers of animals grazed by Navajos from September 28, 1962-April 18, 1979. Dr. Workman's figures for grazing fees and the amount due will be discussed in the following section, but are represented in this table. *See* Ex. 20d.

Dr. Workman testified that the 4:1 ratio to convert SUs to AUs was proper because the BIA grazing regulations used a 4:1 conversion ratio and some of the livestock counts reported in AUs had originally been converted from SUs using the 4:1 ratio. He further testified that the metabolism rule currently used in range management, which compares the amount of forage consumed by a 1,000 lb. cow to the amount of forage consumed by a 150 lb. sheep, is a 4:1 ratio (a sheep utilizes 24% of the forage used by a cow).

The Navajos take a very different approach to value their grazing during this period. Rather than basing the amount of rent on the number of animals on the range,

Year	AUMs calculated	Grazing fees ($/AUM)	Amount due (1/2 total) ($)
1962	61,383 (from 9/28)	1.70	52,176
1963	243,925	1.78	217,093
1964	273,085	2.15	293,566
1965	266,626	2.90	386,608
1966	265,476	2.12	281,405
1967	245,794	2.13	261,771
1968	265,448	2.33	309,247
1969	280,824	2.18	306,098
1970	205,043	2.58	264,505
1971	255,277	2.09	266,764
1972	367,015	1.89	346,829
1973	437,331	2.09	457,011
1974	375,381	2.41	452,334
1975	420,300	3.45	725,018
1976	425,034	4.22	896,822
1977	263,542	3.68	484,917
1978	135,021	2.57	173,502
1979	12,092 (to 4/18)	3.47	20,980

the Navajos use the safe stocking rate for each year, based on BIA estimates of grazing capacity. The Navajos contend that the market would only pay for that amount of forage that could be harvested by animals without causing degradation to the range, which is measured by the safe stocking rate. The Navajos contend that any use beyond the safe stocking rate is "uneconomic" and would thus not be assessed rent in the open market.

Gene Price,[7] who testified on behalf of the Navajo Nation, calculated the safe stocking rate for each year from 1962-1979. The BIA had calculated the safe stocking rate for 1964 and 1973. Based on this data, Price projected the annual change to establish an estimate of safe stocking rate for the intervening years.[8]

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[7] Gene Price is an accredited appraiser of rural properties who has conducted numerous appraisals of ranch property. He conducted appraisals for the Navajo Nation in the damage, owelty, and use cases. *See* Ex. 295 (report); Ex. 334.1b (resume).

[8] Gene Price calculated the following safe stocking rates from 1962-1979. Price's estimated annual grazing fees, and rent due is also represented on this table, and will be discussed in the next section.

Year	Safe stocking rate (AUMs)	Grazing Fees ($/AUM)	Amount Due (1/2 of total)
1962	14,379 (from 9/28)	.78	5,608
1963	54,360	1.22	33,160
1964	52,884	1.22	32,160
1965	51,408	1.22	31,359
1966	49,932	1.35	33,704
1967	48,456	1.35	32,708
1968	46,980	1.35	31,712

The Hopis respond that the BIA estimates of the safe stocking rate are based on the amount of "climax" forage that can be consumed without doing damage to the range. A plant community is in "climax" condition when it is stable for a certain climate and soil type; i.e. it contains those plant species in the final stage of succession present in an undisturbed ecosystem. The BIA determines range condition, and hence the safe stocking rate, by measuring the range's deviation from the climax condition.

The BIA does not count non-climax forage, such as annual vegetation, in its estimate of range condition even though the non-climax forage can be consumed by livestock. When range is in poor condition, as most of it was in 1962 to 1979, a small percentage of the forage actually present on the range is climax forage, and thus the safe stocking rate is set at a very low rate. The Hopi Tribe argues that the Navajo livestock ate all of the vegetation on the JUA, not just the climax forage, and the Navajo Nation should be liable for the full amount of that use.

The Court concludes that the rent assessed the Navajo Nation for grazing use of the JUA from 1962-1979

1969	45,504	1.80	40,954
1970	44,028	1.80	39,625
1971	42,552	2.69	57,232
1972	41,076	2.69	55,247
1973	39,600	2.69	53,262
1974	38,124	2.75	52,421
1975	36,648	2.75	50,391
1976	35,172	2.76	48,537
1977	33,696	2.78	46,837
1978	32,220	2.79	44,947
1979	9,013 (to 4/18)	2.90	13,069

will be based on the number of animals on the range during that period, and hence, based on the climax and non-climax forage actually consumed. Although the Navajos argue that grazing beyond the safe stocking rate is "uneconomic", this argument goes to whether or not private parties would lease their land to parties which would overgraze the land (which they would not do without a premium rental rate). The argument has no bearing on the value of grazing which actually occurred.

However, the Navajos also challenge Dr. Workman's calculations of AUMs of forage consumed by the livestock. As discussed above, Dr. Workman used a 4:1 ratio to convert the number of sheep grazed (SUs) to AUs of forage. The conversion ratio does not affect the counts of cows or horses.

Gene Price testified that a 5:1 conversion ratio from SUs to AUs should be used since market values are based on a 5:1 ratio, and market rental rates are applied in this case. Gene Price further testified that the BIA adopted a 4:1 conversion ratio to encourage the shift from sheep to cattle grazing. Dr. Thadis Box, the Hopi range management expert, testified on cross-examination that his textbook on range management, a standard for the industry, utilizes a conversion ratio of 5:1. Arvel Hale, Chief Appraiser for the BIA, also testified that the market uses a 5:1 conversion ratio.

Because this Court is assigning a market value to the Navajo use of the JUA prior to partition, the rental value must reflect market conditions if possible. Although the BIA may have valid policy reasons to set the conversion ratio at 4:1, this Court is not setting safe stocking rates for

the JUA nor trying to encourage the grazing of different types of livestock. The use of a 4:1 conversion ratio would result in a 25% higher rental assessment than if that land had been leased on the open market by the Hopi Tribe prior to partition. Thus, this Court will utilize a 5:1 conversion ratio for SUs to AUs where livestock counts were originally reported in SUs.

Dr. Workman testified that in some instances the BIA had used a 4:1 conversion ratio when grazing was originally reported in AUs. However, because this Court has no basis from which to conclude what portion of the reported AUs were sheep, the livestock data originally reported in AUs will not be reduced.

The Hopis claim that the Navajo Nation is collaterally estopped from challenging the use of the 4:1 conversion ratio. In the 1985 post-partition rental determination, this Court upheld the Secretary of Interior's decision that the Navajo Nation was estopped from administratively challenging the use of the 4:1 conversion ratio because the issue had already been litigated in previous administrative rental determinations.

However, the Navajos are not collaterally estopped from raising the issue in this Court. *See Plaine v. McCabe*, 790 F.2d 742, 749 (9th Cir. 1986) (collateral estoppel is only proper where agency determination was "an adversary proceeding in which opposing parties were present and represented by counsel and were allowed to call, examine, cross-examine, and subpoena witnesses"). The Navajos argue that they did not have the opportunity to put on witnesses or to cross-examine or confront evidence offered by the Hopi Tribe; this was not contested

by the Hopis. Further, section 640d-15 gives jurisdiction to the Secretary of Interior to determine post-partition rental due, while section 640d-17(a)(2) grants the District Court exclusive jurisdiction to determine pre-partition rental or "use".

The Navajo Nation challenges Dr. Workman's calculations for another reason. The Navajos argue that because there was such a large number of animals using the range, there was not sufficient forage to feed all of them and many animals were starving, resulting in below-average animal weights and productivity. If this were the case, the animals were not consuming as much forage as the AU values would indicate, as calculated from the number of animals present.

The Navajos introduced evidence that Navajo sheep-weights were below average. Gene Price testified that BIA documents generated from the livestock reduction program in the late 1970's demonstrated that Navajo sheep weighed about 100 lbs. and that Navajo cattle weighed approximately 750 lbs.[9] *See* Ex. 206 (sample of approximately 200 livestock sale sheets). With a few exceptions, these documents demonstrate that most of the ewes weighed approximately 90-110 lbs., and that rams and billy goats weighed approximately 120-140 lbs. Many of the animals weighed less than this. These documents

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[9] This is contrasted with the standard sheep weight of 150 lbs. upon which the SU standard of forage consumption is based, and the standard cattle weight of 1000 lbs. upon which the AU standard of forage consumption is based.

included only three sale sheets on cattle, from which no valid conclusion can be drawn about the average weight of cattle on the JUA.

Price further testified that the sale sheets confirm his own experience with Navajo sheep. In 1958, Price arranged purchases of livestock for a packing plant in Paris, TX. He testified that the plant received Navajo sheep which weighed an average of 100 lbs., while sheep from non-reservation ranches weighed 140-190 lbs.

The Hopi Tribe did not challenge the evidence presented by the Navajos that Navajo sheep were below average weight, and did not present evidence to the contrary. Thus, this Court will reduce the AUMs attributable to sheep (originally reported in SUs) by 20%. This is a conservative reduction based on the evidence that Navajo sheep weighed less and therefore would consume less than non-reservation animals.

Finally, the Navajos argue that the rent assessed should be reduced because Navajo livestock were being fed supplemental feed, and that the number of animals is therefore not an accurate measure of the forage consumed on the range. The Navajo Nation introduced documents which demonstrate that there were emergency feed and grain programs providing some supplemental feed on the Navajo Reservation during this time period. See Ex. 245 (Memorandum of Understanding No.3, between the Department of Agriculture and the Department of the Interior) (1962 agreement to donate feed grain to relieve economic distress or disaster conditions existing among Indian Tribes); Ex. 248 (Memorandum of Understanding No. 4, between the Department of Agriculture and the

Department of the Interior) (1963 agreement to donate feed grain to relieve economic distress or disaster conditions existing among Indian Tribes); Ex. 254 (Executive Order 11336 re: Emergency Livestock Feed, Fed. Reg. Vol. 32, No. 57, March 24, 1967); Ex. 255 (Memorandum from Area Director, Navajo Area Office, to Commissioner of Indian Affairs re: evaluation of the 1971 drought impact interim report, dated 12/18/71); Ex. 256 (Memorandum from Area Director, Navajo Area Office, to Agency Superintendent re: 1971-72 feed grain program, dated 7/25/72) (81,600,000 lbs. of grain delivered to entire Navajo Reservation); Ex. 257 (Memorandum from Jack E. Shoemaker re: closing analysis of feed grain calculations, 1971-72 program, dated 10/2/72) (81,603,192 lbs. of grain distributed on Navajo Reservation to 10,406 eligible Indians at a cost of $555,846 to Navajo Tribe); Ex. 265 (Memorandum from Area Director, Navajo Area Office, to Commissioner of Indian Affairs re: emergency relief for Navajo livestock, dated 10/18/74) (requests 80 million lbs. of grain due to drought conditions); Ex. 267 (Letter from Area Director, Navajo Area Office, to Navajo Agricultural Products Industry re: feed gain program for 1971-1975, dated 10/21/76) (81,603,192 lbs. received in 1971-72, 40,676,575 lbs. received in 1972-73, and 40,057,988 lbs. received in 1974-75); Ex. 268 (Memorandum from Area Director, Navajo Area Office, to Commissioner of Indian Affairs re: final report on the 1975 emergency feed grain program, dated 8/27/75) (40,057,988 lbs. distributed).

Price also testified that around 1958, he hauled hay and feed onto the Navajo Reservation.[10]

While it is clear that supplemental feed was delivered to the Navajo Reservation during these years, the above evidence does not demonstrate how much emergency feed and grain was provided to Navajo individuals *on the JUA*. There is therefore no reliable evidence concerning supplemental feed on the JUA, and a reduction of rent assessed based this evidence would be speculative.

This Court concludes that the amount of rent assessed for Navajo grazing from 1962-1979 will be based on the actual number of animals grazed on the JUA, and hence the actual amount of forage consumed. The Court will use a 5:1 conversion ratio for SUs to AUs, and the amount of rent attributable to sheep will be reduced by 20% to account for the fact that Navajo sheep were not

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[10] These documents demonstrate that in 1971-72, approximately 80 million pounds of supplemental feed were delivered to the Navajo Reservation; half that amount was delivered in 1972-73 and 1974-75. There is no information regarding how much supplemental feed, if any, was delivered in 1973-74 or other years between 1962 and 1979. 80 million pounds of feed equals approximately 160,000 AUMs of forage. The JUA is approximately 1/10 of the Navajo Reservation; assuming equal distribution of the emergency feed, the JUA received approximately 16,000 AUMs of feed in 1971-72, and approximately 8,000 AUMs of feed in 1972-73 and 1974-75. In 1971, 255,277 of AUMs were consumed on the JUA based on the number of animals (see following table); 16,000 AUMs is only 6.3% of the AUMs consumed. In 1972, 234,891 AUMs were consumed based on the number of animals on the range; 8,000 AUMs of supplemental feed represent only 3.4% of the total AUMS. And in 1974, 375,381 AUMs were consumed on the JUA; 8,000 AUMS represent only 2.1% of the total forage consumed.

consuming an entire SU of forage, as valued by the market. The Court's conclusions are represented in a table at the end of the following section.

The measure of value of Navajo grazing

Dr. Workman also testified on behalf of the Hopis regarding the appropriate lease rates to apply to Navajo grazing. Dr. Workman utilized data of average Arizona private lease grazing fees published by the Agricultural Statistics Service. Because there was no data on Arizona grazing leases for 1962 and 1963, Workman used Agricultural Statistics Service lease data from the Mountain States (which have a higher lease rate), and corrected for the average percent difference between average Arizona and Mountain States grazing lease fees.

Dr. Workman testified that he had not investigated the specifics of the Arizona grazing leases included in the Agricultural Statistics Service data, such as the acreage of the leased land, the grazing capacity of the land, or whether those leases included services such as fencing, water maintenance, residences, corrals, or other improvements. Workman testified that it was not necessary to determine the specifics of the comparables, since the data he used was a statistical average of a large sample of all Arizona grazing leases. The Hopi Tribe also argues that the data is reliable because it was collected for purposes other than this litigation.

Dr. Workman adjusted the Arizona private grazing fees by 25 percent to eliminate the part of the private fee generally attributable to landlord services (construction

and maintenance of fences and water facilities and supervision of livestock) and livestock operating cost savings (no grazing association fees, smaller pasture size leading to decreased roundup costs and fewer lost animals, and less distance to base property lowering supervision and transportation costs) not provided on the JUA. Grazing lease rates with no services are 30 percent lower than the private lease rates. Although Dr. Workman initially made no adjustment for fence and stock water facilities on the JUA because he believed they were constructed and maintained by the BIA, he later recalculated his adjustment to account for the fact that the Navajos were paying for some of the water and that fencing was very limited on the JUA prior to partition. See Ex. 2391.a.1 (Vol. II of Mediator's report) (Navajo Nation funded the construction of many wells and springs on the JUA). Dr. Workman noted that the adjusted Arizona private fee is less than the Navajo Nation charged its own tribal members for grazing the Bar N Navajo Tribal Ranch in Sanders.[11]

Gene Price opined that private ranch leases were not comparable to the JUA because they contain services and improvements not present on the JUA from 1962-1979. He did not address whether private lease rates would be comparable if adjusted for the lack of services and improvements.

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[11] Dr. Workman testified that he did not use rates charged by the BIA for grazing on Indian reservation land, although they would have been the most accurate estimate of grazing fees on the Navajo Reservation, because they could not be found for most of the years between 1962 and 1979.

Price based his estimate of rental rate on grazing fees from land holding company leases. Land holding companies own land primarily for other interests, such as timber, minerals, and long term investment, and provide little or no development of range improvements on the grazing land; lessees must furnish and maintain their own improvements. Price believed that these leases were comparable to the JUA, which had few services and improvements prior to partition.

However, land holding company leases were only available from 1972-1979, so Price "indexed" BLM lease rates from later years where he could compare BLM lease rates and land holding company lease rates, and projected those indexed BLM rates to 1962-1972. On cross-examination, Price conceded that the increases in BLM fees over the years reflect policy changes and not market changes; from 1970-71, for instance, there was a moratorium on fees. The BLM fees were below fair market rental.

The Court will adopt Dr. Workman's calculations regarding the Arizona private lease rates, which were adjusted substantially to account for the lack of services on the JUA from 1962-1979.

Conclusion

The Court will award $4,642,778 plus 6% interest compounded annually, for a total of $16,547,336, to the Hopi Tribe for Navajo grazing use from September 28, 1962 - April 18, 1979. The following table illustrates the Court's calculations:

Year	AUMs	Grazing fees ($/AUM)	Rent due (1/2JUA) ($)	6% int. factor —	Total Rent ($)
1962	39,285[12]	1.70	33,393	5.9409	198,380
1963	156,111	1.78	138,939	5.6046	778,696
1964	174,774	2.15	187,882	5.2874	993,407
1965	170,640	2.90	247,428	4.9881	1,234,196
1966	265,476	2.12	281,405	4.7058	1,324,235
1967	157,307	2,13	167,532	4.4394	743,741
1968	265,448	2.33	309,247	4.1881	1,295,157
1969	280,824	2.18	306,098	3.9499	1,209,057
1970	205,043	2.58	264,505	3.7274	985,918
1971	255,277	2.09	266,764	3.5164	938,051
1972	234,891	1.89	221,972	3.3174	736,370
1973	279,892	2.09	292,487	3.1296	915,368
1974	375,381	2.41	452,334	2.9525	1,335,516
1975	268,992	3.45	464,011	2.7853	1,292,410
1976	272,022	4.22	573,966	2.6277	1,508,212
1977	168,666	3.68	310,345	2.4789	769,315
1978	86,413	2.57	111,041	2.3386	259,680
1979	7,740	3.47	13,429	2.2062	29,627
Total			$4,642,778		$16,547,336

[12] Dr. Workman reported 20,461 SUs in 1962. This figure is divided by 5 under the 5:1 conversion ration [sic] to report the figure in AUs, and then multiplied by 12 to report the figure in AUMs. To account for the low animal weight, the AUMs are reduced by 20%. (20,461 x 12/5 = 49,106 x .80 = 39,285 AUMs). The animal counts expressed in the BIA records as AUs were not reduced (1966, 1968-1971, and 1974). The Court utilized the compound interest factor used by Dr. Workman.

II. Fair value of Navajo agricultural use

Robert Francy testified on behalf of the Hopi Tribe about the value of Navajo agricultural use of the JUA. Francy utilized a crop-share method of valuation because there was no cash-rental of farmland on the JUA, and assigned a crop-share of 20 percent (that percentage of crop which goes to the land owner) due to the low yields and labor-intensive nature of the farming on the JUA. Francy concluded that approximately 6,000 acres of the JUA were farmed each year between 1962-1979, based on a review of aerial photographs and BIA range surveys. Francy assumed a fallow rate of 25 percent because native corn does not quickly deplete the soil and is not typically "cropped" in an intensive manner (i.e., the plants are spaced far apart).

Francy based his valuation on native corn production, a common crop on the JUA. Francy concluded that floodplain land would produce 500 lbs./acre and dryland farms would produce 250 lbs./acre, based on two surveys of Hopi farms growing native corn in 1985 and 1990. Francy testified that this yield information was confirmed by Soil Conservation Service ("SCS") personnel and others familiar with native corn production, and is corroborated by Navajo native corn yields reported in the 1930's. Francy used a ratio of 85 percent floodplain to 15 percent dryland farms.

Francy also testified that Leroy Voight and his father, who had traded in Indian corn for decades, informed Francy that the price of shelled Indian corn remained stable at $.10/lb. through the 1960's to mid-70's, and that

in 1976, the price doubled to $.20/1b. The price information was not challenged by the Navajos. Francy concluded that from 1963-1975, native corn production would produce $20,813/yr., and from 1976-1978 would produce $41,625/yr. He did not value agricultural use in 1962 and 1979, since only partial years were involved which did not fall during a growing season. He opined that the total rent due to the Hopi Tribe is $395,444, plus 6% compounded interest for a total of $1,357,854.

The Navajos first challenge Francy's assumption that an appropriate fallow rate would be 25 percent; Gene Price testified that a 50 percent fallow rate would be necessary to retain moisture in the soil from the following year. The Court finds that if the crop-share methodology is used, a 25 percent fallow rate is reasonable for the reasons provided by Francy.

Next, the Navajos argue that because the market for Indian corn is so small, 2,081,250 pounds of Indian corn (the total annual production of the JUA as calculated by Francy) could not be sold at the prices given. The Navajos cite various cases in which a court required an appraiser to demonstrate that there was a market for the volume of the commodity used in an appraisal. *See United States v. Land in Dry Bed of Rosamond Lake,* 143 F. Supp. 314 (S.D. Cal. 1956); *Cameron Development Co. v. United States,* 145 F.2d 209 (5th Cir. 1944); *United States v. Whitehurst,* 337 F.2d 765 (4th Cir. 1964). However, under the crop-share methodology, only that portion of the crop given to the landlord (20%) must be marketable, or 416,250 lbs per year. Of that amount, only half is attributable to Navajo farming, or 208,125 lbs. The evidence demonstrates that

this amount would be supported by the market for Indian corn.

The Navajos also challenge Robert Francy's calculations of corn yields. Francy utilized information based on two surveys of Hopi farmers, which demonstrated that Hopi farms produced 500 lbs./acre in floodplains and 250 lbs./acre in drylands. The Navajos argue that these surveys are not scientifically reliable, and thus should not be admissible, citing *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988) (the proponent of a survey must show that it was conducted in accordance with generally accepted survey principles and that the results were used in a statistically correct manner). The data resulted from 8 dryland acres and 1½ floodplain acres. The Hopis argue that this was the best available evidence, and that it was corroborated by similar yields from Navajo farms in the 1930's.

Gene Price testified that Francy's estimate of corn production was too high. Price calculated that the actual yield would be closer to 180 lbs./acre, based on an experiment he conducted. Price himself grew Indian corn for the purpose of his testimony and weighed seven ears of the corn; each ear weighed an average of 1.1 ounces. He opined that each corn stalk produces an average of 1.25 ears, that there are two stalks per planting hill, that the hills are spaced six feet apart, for 1210 hills per acre. Price concluded that this results in 3025 ears per acre, or 3,358 ounces/acre, 2,878 ounces of shelled corn, or 180 lbs./acre. The Court will not utilize the results of Mr. Price's experiment: the ears of Indian corn on which he based his analysis were *extremely* small, and there was no showing that they were of average size for Indian corn. Further,

there was no evidence that his corn was grown under similar circumstances as corn on the JUA.

Gene Price based his own appraisal of Navajo farming on information from one dryland farm outside of Gallup, New Mexico.[13] This farm operated on a crop-share lease, in which the land owner received 25 percent of the crop. The farmer grew oats, produced 75,000 pounds per year on average at $0.09 per pound, for a total value to the owner of $1,687.50. This translated to an average rent of $1.77 per acre.[14] With contribution of improvements, the rent approximated $1.25 per acre. To arrive at a rental value, Gene Price multiplied $1.25 per acres times 5,416 acres of farmland on the JUA,[15] and arrived at an annual rental of $6,770 per year, or $3,385 per year allocated to Navajo farming. Over 16 years, Gene Price opined that the total rent due to the Hopi Tribe is $54,160.

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[13] Gene Price had evaluated other dryland leases, as well, but rejected them for use as comparables.

[14] Although the Navajos contend that this appraisal is based on the "cash-rental" method because Price calculated an average rent per acre, the appraisal is actually based on the crop-share method because the comparable used was a crop-share lease. None of the variables for establishing a crop-share rent were similar to the JUA: the crop-share, crop grown, price of the crop, and production were different.

[15] The 1963 BIA Soil and Range Inventory classified 5,997 acres as farm land on the JUA, 581 acres of which were abandoned.

The Court adopts Robert Francy's opinion regarding agricultural use of the JUA. Based on the evidence presented to this Court, Francy's analysis is more thorough, is based on farming practices actually in use on the JUA during the relevant time period, and utilizes the best available evidence. However, since the BIA found that only 5,416 acres were actually farmed in 1963 and there is no evidence that this amount increased in the intervening years, the Court will utilize a total farmland acreage of 5,416 acres.

Total acres farmed:	5,416 acres
½ acres farmed:	2,708 acres
85% floodplain farms:	2,302 acres x 500 lbs/yr =1,150,900 lbs/yr
15% dry farms:	406 acres x 250 lbs/yr = 101,550 lbs/yr
Total lbs/yr:	1,252,450 lbs/yr
25% fallow rate:	939,338 lbs/yr
20% crop-share:	187,868 lbs/yr x $.10/lb = $18,787/yr (1963-75)
	187,868 Lbs/yr x $.20/lb = $37,574/yr (1976-78)

Year	Crop-share Income	6% Interest Factor	Total rental
1963	$18,787	5.4184	$101,795
1964	18,787	5.117	96,133
1965	18,787	4.8223	90,597
1966	18,787	4.5494	85,470
1967	18,787	4.2919	80,632
1968	18,787	4.0489	76,067
1969	18,787	3.8197	71,761
1970	18,787	3.6035	67,699
1971	18,787	3.3996	63,868
1972	18,787	3.2071	60,252
1973	18,787	3.0256	56,842
1974	18,787	2.8543	53,624
1975	18,787	2.6928	50,590
1976	37,574	2.5404	95,453
1977	37,574	2.3966	90,050
1978	37,574	2.2609	84,951
Total:	$356,953		$1,225,784

III. Conclusion

In summary, the Hopi Tribe will be awarded $16,547,336 for Navajo grazing use and $1,225,784 for Navajo agricultural use of the JUA from September 28, 1962 – April 18, 1979, for a total of $17,773,120.

CONCLUSIONS OF LAW

This Court has jurisdiction pursuant to Section 18 of the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d-17(a)(2), 88 Stat. 1714, P.L. 93-531 (1974).

Section 640d-17(a)(2) authorizes this Court to award the Hopi Tribe one-half of the fair value of Navajo grazing and agricultural use of the Joint Use Area ("JUA") from September 28, 1962 – April 18, 1979, together with 6% interest compounded annually.

To measure the "fair value" of Navajo grazing on the JUA during this time period, this Court will utilize actual counts of livestock conducted by the BIA, and as reported in Navajo tribal documents and court documents. The Court rejects the Navajo contention that damages awarded for grazing use should be limited to the safe stocking rate, as measured by the BIA based on the deviation from "climax" condition; this method would not measure the full grazing use of the JUA and would hence not be the "fair value" of Navajo grazing as required by section 640d-17(a)(2).

The Court will utilize 5:1 ratio to convert Sheep Units (SUs) to Animal Units (AUs) because the 5:1 conversion ratio is used in the market to set rental rates. The Navajo Nation is not collaterally estopped from challenging the use of a 4:1 conversion ratio; although this Court affirmed the Secretary of Interior's decision in the 1985 post-partition rental determination that the Navajo Nation was estopped from administratively challenging the 4:1 conversion ratio because the issue had been litigated in previous rental determinations, the administrative decision is not given collateral estoppel effect in this Court. *See Plaine v. McCabe,* 790 F.2d 742, 749 (9th Cir. 1986) ("an adversary proceeding in which opposing parties were present and represented by counsel and were allowed to call, examine, cross-examine, and subpoena witnesses"). The Hopis did not contest the assertion that the Navajos

did not have the opportunity to put on witnesses or to cross-examine or confront evidence offered by the Hopi Tribe. Further, section 640d-15 gives jurisdiction to the Secretary of the Interior to determine post-partition rent, while section 640d-17(a)(2) grants this Court exclusive jurisdiction to determine pre-partition rent, or "use".

This Opinion, in its entirety, constitutes the Court's Findings of Fact and Conclusions of Law with respect to the claim asserted pursuant to 25 U.S.C. § 640d-17(a)(2).

In the event any of the Findings of Fact or Conclusions of Law should more appropriately be considered as the other, they shall be so considered.

Accordingly,

IT IS ORDERED that the Navajo Nation shall pay the Hopi Tribe $17,773,120.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter final judgment in favor of the Hopi Tribe and against the Navajo Nation in the amount of $17,773.120.

DATED this 18th day of December, 1992.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

United States District Court
DISTRICT OF ARIZONA

VERNON MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe,

Plaintiff,

v.

PETERSON ZAH, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe,

and

THE UNITED STATES OF AMERICA,

Defendants.

JUDGMENT IN A CIVIL CASE

(Filed Jan. 15, 1993)

CASE NUMBER: CIV-76-934-PHX-EHC

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[xx] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that final judgment is entered in favor of the Hopi Tribe and against the Navajo Nation in the amount of $3,167,388.84;

FURTHER ORDERED AND ADJUDGED that final judgment is entered in favor of the United States and against the Hopi Tribe; and

FINALLY ORDERED AND ADJUDGED that final judgment is entered in favor of the United States and against the Navajo Nation as to the Navajo Nation's Cross-Claim for indemnity.

JANUARY 15, 1993
Date

/s/ RICHARD H. WEARE
Clerk

/s/ _____
(By) Deputy Clerk

United States District Court
DISTRICT OF ARIZONA

VERNON MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe,

Plaintiff,

V.

PETERSON ZAH, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe,

Defendant.

JUDGMENT IN A CIVIL CASE

(Filed Oct. 13, 1994)

CASE NUMBER: CIV-76-936-PHX-EHC

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that final judgment is entered in favor of the Hopi Tribe and against the Navajo Nation in the amount of $18,187,132.00.

October 13, 1994
Date

/s/ RICHARD H. WEARE
Clerk

/s/ _____
(By) Deputy Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-17031
CT/AG#: CV-58-00579-EHC

(Filed Oct. 27, 1997)

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe

Plaintiff - Appellant

v.

ALBERT HALE, President of the Navajo Nation; NAVAJO NATION; UNITED STATES OF AMERICA

Defendants - Appellees

NO. 94-17032
CT/AG#: CV-76-00934-EHC

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe

Plaintiff - Appellant

v.

ALBERT HALE, President of the Navajo Nation; NAVAJO NATION; UNITED STATES OF AMERICA

Defendants - Appellees

NO. 95-15015
CT/AG#: CV-58-00579-EHC

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe

Plaintiff - Appellees

v.

ALBERT HALE, President of the Navajo Nation; NAVAJO NATION; UNITED STATES OF AMERICA

Defendants - Appellants

NO. 95-15029
CT/AG#: CV-76-00934-EHC

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe

Plaintiff - Appellee

v.

ALBERT HALE, President of the Navajo Nation; NAVAJO NATION; UNITED STATES OF AMERICA

Defendants - Appellants

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix)

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part, REVERSED and REMANDED in part.

Filed and entered – 7/8/97.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

Sep. 25, 1997

by /s/ Illegible
Deputy Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-17022
CT/AG#: CV-76-00936

(Filed Oct. 27, 1997)

VERNON MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe.

Plaintiff - Appellee

v.

ALBERT HALE, President of the Navajo Nation; NAVAJO NATION

Defendants - Appellants

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix)

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part, REVERSED and REMANDED in part.

Filed and entered - 7/8/97.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

Sep. 25, 1997

by /s/ Illegible
Deputy Clerk

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for an [sic] on behalf of the Hopi Indian Tribe, Plaintiff-Appellee, v. ALBERT HALE, President of the Navajo Nation; NAVAJO NATION, Defendants-Appellants.	No. 94-17022 DC No. CV-76-00936-EHC (District of Arizona) ORDER (Filed Sep. 17, 1997)
FERRELL SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, Plaintiff-Appellant/ Cross-Appellee, v. ALBERT HALE, President of the Navajo Nation; NAVAJO NATION; UNITED STATES OF AMERICA, Defendants-Appellees/ Cross/Appellant.	Nos. 94-17031 95-15015 DC No. CV-58-00579-EHC

FERRELL, SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe,	)	Nos. 94-17032 95-15029
Plaintiff-Appellee/ Cross-Appellant,	)	DC No. CV-58-00579-EHC
v.	)	
ALBERT HALE, President of the Navajo Nation; NAVAJO NATION; UNITED STATES OF AMERICA,	)	
Defendants-Appellants/ Cross/Appellees.	)	

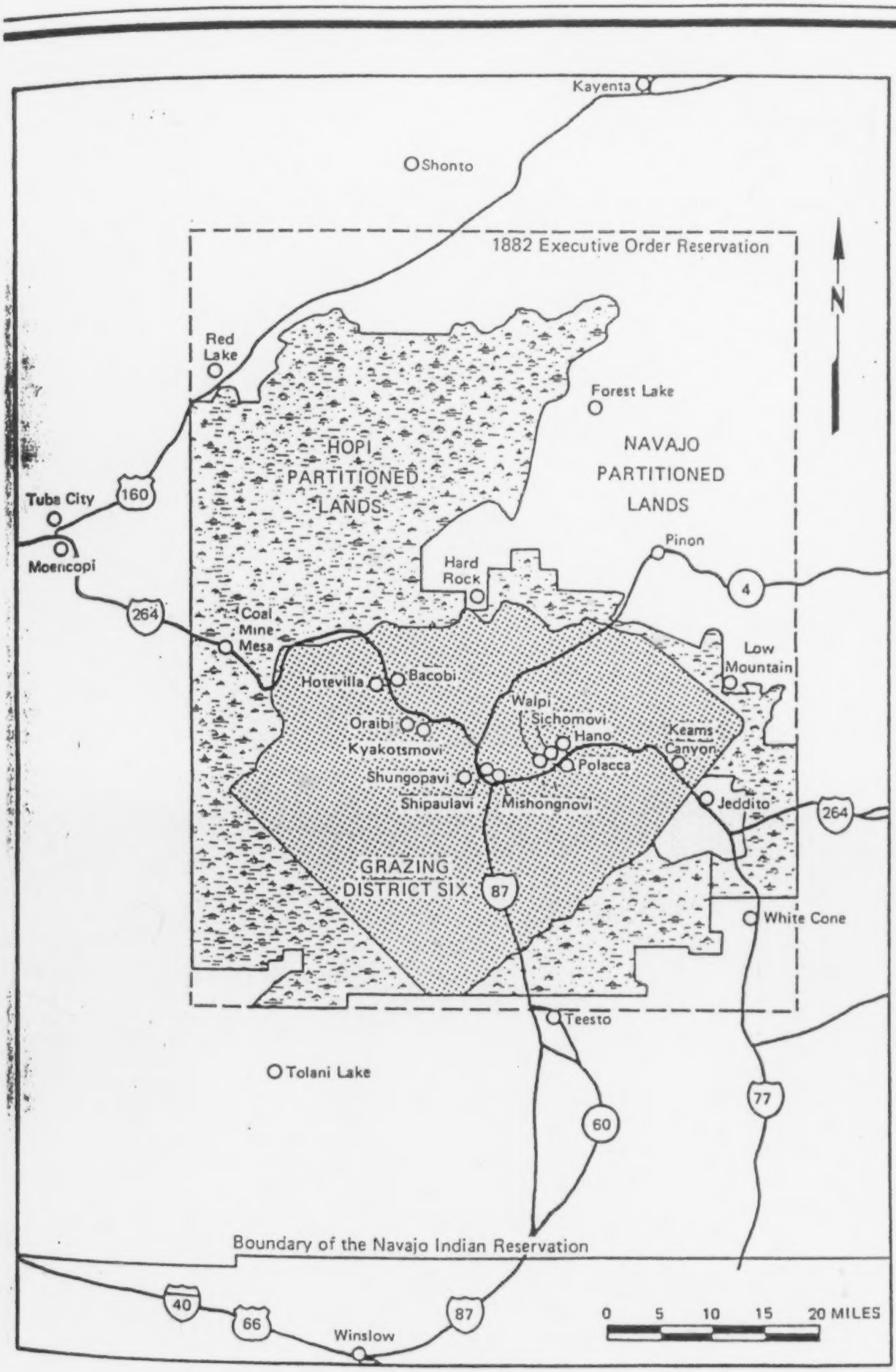
Before: SCHROEDER, FLETCHER, and RYMER, Circuit Judges.

The panel has voted unanimously to deny the Petitions for Rehearing in 94-17022 and 94-17031/95-15015.

Judges Schroeder and Rymer have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc in 94-17032/95-15029. Judge Fletcher would grant the Petition for Rehearing and Suggestion for Rehearing en banc in 94-17032/95-15029.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petitions for rehearing are denied and the suggestion for rehearing en banc is rejected.



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No. 97-1022

In The

Supreme Court of the United States

October Term, 1997

ALBERT HALE, President of the Navajo Nation and the NAVAJO NATION,

Petitioners,

vs.

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council and THE HOPI TRIBE and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE HOPI TRIBE

TIMOTHY G. ATKESON
Counsel of Record
DAPHNE WERTH
ARNOLD & PORTER
Attorneys for Respondent The Hopi Tribe
Suite 4000
1700 Lincoln Street
Denver Colorado 80203
(303) 863-1000

144251

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

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QUESTIONS PRESENTED[1]

1. Whether the Ninth Circuit correctly determined that the district court did not abuse its discretion by admitting the expert testimony of Dr. John Workman — a range economist — on the valuation of grazing opportunities on Hopi lands.

2. Whether the Ninth Circuit correctly applied comment b to § 931 of the Restatement (Second) of Torts to award the Hopi Tribe damages for lost grazing opportunities on vacant ranges.

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1. The Navajo Nation also raised an argument regarding the liability of the United States. The Hopi Tribe has settled with the United States and does not take a position on that issue.

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The Hopi Tribe ("Tribe" or "Respondent") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF THE CASE

A. Brief History Of The Case.

The litigation from which this petition arises began in 1958, when Congress passed legislation authorizing a lawsuit to determine the respective rights and interests of the Tribe and the Navajo Nation (the "Nation" or "Petitioner") in a 2.5 million acre reservation in northern Arizona. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403. That reservation was created by executive order of President Chester Arthur in 1882. The order reserved the land for the Hopi and "such other Indians as the Secretary of Interior may see fit to settle thereon." Exec. Order of Dec. 16, 1882, *reprinted in*, *Healing v. Jones*, 210 F. Supp. 125, 129 n.1 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963). In 1882, there were approximately 300 Navajo people within the area reserved. *Healing*, 210 F. Supp. at 145. By 1958, that number had increased to some 8800, *id.*, and serious disputes had arisen between the Tribe and the Nation over the use and ownership of the land. Pursuant to the 1958 Act, the Tribe sued the Nation and the United States in an effort to resolve the dispute.

In 1962, a three-judge panel of the district court held: (1) that the Tribe possessed exclusive title to an area of some 600,000 acres in the southern part of the 1882 Reservation known as "District 6" or "Land Management Unit 6"; (2) that the Tribe and the Nation held joint, undivided, and equal title in the rest of the Reservation — a 1.8 million-acre area that came to be known as the Joint Use Area ("JUA"); and (3) that Congress had not granted the court jurisdiction to partition the JUA. *Healing*, 210 F. Supp. at 191-92.

The Tribe was unable to make use of its interest in the JUA, however, because the Nation ousted them from possession. *Hamilton v. MacDonald*, 503 F.2d 1138, 1146 (9th Cir. 1974). The Tribe made repeated attempts to regain its interest in the JUA; all failed. Finally, Congress intervened in 1974. In comprehensive legislation, it attempted to effect a "Settlement of Rights and Interests" of the Tribe and the Nation. 25 U.S.C. § 640d *et seq.* (the "1974 Act"). The 1974 Act authorized the district court to make a "final adjudication, including partition of the [JUA]." 25 U.S.C. § 640d-3. After the Tribe and the Nation failed in mediation to agree upon a boundary line, the district court partitioned the area. The judgment of partition became final on April 18, 1979. The Tribe's portion of the JUA became known as the Hopi Partitioned Lands or the "HPL."

In addition to giving the district court authority to partition the JUA, the 1974 Act authorized a series of auxiliary actions for money damages. *See* 25 U.S.C. §§ 640d-17(a)(2) & (a)(3). Two of those actions are the subject of the Nation's petition. Section 640d-17(a)(2) authorized an action for the recovery of the "fair value of the grazing and agriculture use" by the Navajos of the Tribe's one-half interest in the JUA from 1962 to 1979 (the date of the *Healing* decision to the date of the partition). That action is known as the "Use Case." A second action, under section 640d-17(a)(3), is known as the "Damages Case" and allows the recovery of damages to the HPL from 1979 to 1995 (the date of partition to the date when the HPL can be fully restored) from Navajo overgrazing.

These two actions were consolidated for trial and the district court ruled in the Tribe's favor in both cases. The district court awarded the Hopi $18,187,132 in the Use Case and $3,167,388.84 in the Damages Case.[2]

2. A third action, known as the "Owelty Case," was also consolidated for trial and the subject of the Ninth Circuit opinion below. The Nation did not petition for certiorari on the Owelty Case.

B. Dr. Workman's Role In The Use And Damages Cases.

Dr. Workman provided expert testimony on how to value Navajo grazing on the JUA and the HPL in the Use and Damages Cases.

Dr. Workman has been a professor of Range Economics at Utah State for over twenty-five years. His courses have included Range Management, Range Economics, Rangeland Appraisal, and Range Economic Analysis. He has written the standard textbook on range economics and has authored dozens of peer-reviewed publications on subjects related to his testimony. His expert testimony on range economics, similar to the valuation testimony he provided here, has been admitted by the Claims Court on behalf of the United States. *See White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 665-66 (1987) (qualifying Dr. Workman as "an expert in appraisal and range management" and characterizing his proposed measure of damages as "especially persuasive."), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

In the Use Case, both the Nation and the Tribe agreed that the "fair value" of grazing use should be determined by estimating the amount of forage consumed by Navajo livestock from 1962 to 1979. The parties further agreed that the value of the forage consumed should be determined by multiplying the appropriate number of Navajo livestock by the fee that would have been charged for grazing during each year. Dr. Workman provided testimony regarding the proper fee. Similarly, in the Damages Case, Dr. Workman provided testimony on the proper multiplier fee for calculating the Tribe's lost grazing opportunities on the HPL from 1979 to 1995.

C. The District Court's Decision.

The *Daubert* opinion was not released until after the district court issued its rulings. Therefore, the district court did not expressly address admissibility of expert testimony by reference to *Daubert*. However, the district court carefully examined the qualifications, methodology, and opinions of both Dr. Workman and the Nation's expert on valuation, Mr. Gene Price.

To determine the proper fees, Dr. Workman used data published by the Economic Research Service in the United States Department of Agriculture ("ERS") to calculate average Arizona private range grazing fees. *See* Petitioner's Appendix ("App.") 56, 91. For the years where Arizona data was not available, Dr. Workman used ERS data on the Mountain States (which have a higher lease rate) and corrected for the average percent difference between Arizona and Mountain States grazing lease fees. *Id.* Then Dr. Workman adjusted those rates to eliminate the portion of the fee generally attributable to services not provided on the JUA/HPL. App. 57, 91-92. Mr. Price relied largely on Bureau of Land Management ("BLM") rates, which he "indexed." App. 93.

The district court rejected Mr. Price's fees. According to the court, BLM rates were the improper comparison because they were "below fair market rental" and because changes in those rates "reflect[ed] policy changes and not market changes" — a fact Mr. Price conceded. App. 93. In other words, the district court concluded that below-market rates were not "fair" rates.

The court adopted Dr. Workman's fees, explaining that:

> [t]he use of average private lease rates is reasonable when reductions are taken into account for fewer services on the HPL.

App. 59-60, 93.

The Nation filed appeals with the Ninth Circuit challenging the district court's decision on multiple grounds, including whether the district court clearly erred in admitting Dr. Workman's testimony. The Tribe appealed the district court's decision to deduct from the Tribe's recovery the value of grazing on certain "vacant range cuts."[3]

D. The Ninth Circuit Decision.

Applying an abuse of discretion standard of review, the Ninth Circuit affirmed the district court's decision to admit Dr. Workman's testimony in both the Use and Damages Cases. The Ninth Circuit noted:

> The district court thoughtfully examined the methodology and opinion of each expert, and accepted Dr. Workman's measure of damages only after making appropriate downward adjustments.

Masayesva v. Hale, 118 F.3d 1371, 1378-79 (9th Cir. 1997); App. 13. The court addressed the *Daubert* issue in one sentence:

> The Navajo's reliance on *Daubert* is misplaced because Dr. Workman's testimony derives from his relatively straightforward application of range economics, rather than on a novel scientific theory.

Masayesva, 118 F.3d at 1379; App. 13.

The Ninth Circuit also reversed the district court's ruling on the vacant range cuts, holding that the Tribe should be awarded damages for lost grazing opportunities on those lands. *Masayesva*, 118 F.3d at 1384; App. 27.

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3. The "vacant range cuts" are seven range units that the Tribe could have used for grazing but chose to leave fallow in order to accelerate the restoration process. App. 25.

REASONS FOR DENYING THE WRIT

The Court should deny the petition because it fails to present any "compelling reasons" for granting the writ of certiorari as required by Sup. Ct. R. 10.

First, while a split in the circuits exists over the application of *Daubert* to "applied science" or "quasi-scientific" evidence, there is no split over *Daubert*'s application to the type of non-scientific testimony at issue here. In addition, even if there were such a split, its resolution would not affect the result in this case. The district court decision, although released pre-*Daubert*, assessed the relevance and reliability of Dr. Workman's testimony as required by *Daubert* and admitted it only after concluding that it met the test. That decision is reviewable only for an abuse of discretion and will not be overturned even if the Ninth Circuit is reversed.

Second, the narrow issue of how to interpret the specific language of comment b to § 931 of the Restatement (Second) of Torts hardly rises to the level of an "important question of federal law." Sup. Ct. R. 10(c). Moreover, it is clear the Ninth Circuit's interpretation was correct.

I.

THIS CASE IS AN IMPROPER VEHICLE FOR CERTIORARI ON *DAUBERT*.

The Tribe does not deny that the federal circuit courts differ over the application of *Daubert* to certain types of expert testimony. However, there does not appear to be a split in the circuits over the particular question at issue here — whether *Daubert*'s "relevant and reliable" test applies to non-scientific expert testimony. Moreover, because the district court reviewed Dr. Workman's testimony for relevance and reliability, the

resolution of any supposed split will not affect the outcome in this case.

A. The *Daubert* Decision.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), two minor children and their parents sued Merrell Dow Pharmaceuticals, alleging that the children's severe birth defects resulted from their mothers' ingestion of Benedictin, a prescription antinausea drug, during pregnancy. At issue was the admissibility of certain expert scientific testimony concerning the causal connection between Benedictin and the birth defects.

The Court's decision had two aspects. The first was its rejection of the so-called "*Frye* test" for determining the admissibility of novel scientific evidence. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under *Frye*, evidence is admissible only if derived from a method that has gained " 'general acceptance in the particular field in which it belongs.' " *Daubert*, 509 U.S. at 596 (emphasis omitted) (*quoting Frye*, 293 F. at 1014). In *Daubert*, the Ninth Circuit applied this test in upholding the exclusion of the experts' evidence. This Court reversed, explaining that *Frye* was superseded by the adoption of the Federal Rules of Evidence, and in particular by Rule 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702.

The second aspect of the Court's opinion, and the one pertinent here, is the Court's explanation of the district court's obligation, under Rule 702, to "ensure that any and all scientific testimony or evidence admitted is not only *relevant*, but *reliable*." 509 U.S. at 589 (emphasis added). The Court noted that Rule 702 refers to "technical, or other specialized knowledge," in addition to "scientific knowledge." *Id.* at 590 & n.8. However, "[o]ur discussion," the Court stated, "is limited to the scientific context because that is the nature of the expertise offered here." *Id.*

To assist the lower court on remand, the Court identified four non-exclusive factors that bear on "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . properly applied to the facts in issue." *Id.* at 592-93. Those factors, known as the "*Daubert* factors," are: (1) whether the theory can and has been tested; (2) whether it has been subject to peer review; (3) its rate of error; and (4) its degree of general acceptance within the relevant scientific community. *Id.* at 593-94.

Thus, in *Daubert* this Court held that under Rule 702 a district judge must serve as a "gatekeeper" to ensure that all scientific expert testimony and evidence presented in a federal courtroom is both "relevant and reliable." *Id.* at 589, 597. The "Daubert factors" were provided to assist lower courts in the "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." *Id.* 589, 592-93.

B. The Circuit Split Is Over *Daubert*'s Application To Applied Science Or Quasi-Scientific Experts, Not Over *Daubert*'s Application To Non-Scientific Experts.

Since the *Daubert* decision in 1993, most circuit courts have addressed the question posed in Chief Justice Rehnquist's

opinion: whether *Daubert* applies to all categories of evidence under Rule 702, or merely to the scientific context present in *Daubert* itself? 509 U.S. at 600 (Rehnquist, C.J., joined by Stevens, J., concurring in part and dissenting in part). Petitioner argues that a split in the circuits has evolved over whether *Daubert* applies to non-scientific evidence. The split, however, is over a more narrow issue.

The circuits are divided over whether the "*Daubert* factors" are implicated in an "applied science" or quasi-science context. Thus, the circuit courts are conflicted over, for example, whether *Daubert*'s four factors apply when an engineer testifies about an alternative or defective design in a product liability case. These types of experts base their testimony on their experience and training — training that includes scientific principles at its core. However, the testimony is not the type of "novel scientific knowledge" at issue in *Daubert*. The Second, Ninth, and Tenth Circuits have held that the *Daubert* factors do not apply, while the Third, Fifth, Sixth, Seventh, and Eighth Circuits have held the opposite. *Compare McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995); *McKendall v. Crown Control Corp.*, 122 F.3d 803, 807 (9th Cir. 1997);[4] *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1519 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996) *with Surace v. Caterpillar, Inc.*, 111 F.3d 1039 (3d Cir. 1997); *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997); *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303-04 (6th Cir.), *cert. denied*, 118 S. Ct. 67 (1997); *Cummins v. Lyle Indus.*, 93 F.3d 362, 367-68 (7th Cir. 1996);

4. The Ninth Circuit has actually issued conflicting opinions over whether the *Daubert* factors apply to quasi-scientific expert testimony. *Compare McKendall*, 122 F.3d at 807 (refusing to apply the *Daubert* factors to product design expert); *with Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 n.8 (9th Cir. 1997) (applying *Daubert* factors to turfgrass breeding, genetics and management expert). Thus, the split over this issue is intra-circuit as well as inter-circuit.

Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 297 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997).

The question presented in this case — whether *Daubert*'s "relevant and reliable" test applies to *non-scientific* expert testimony — is not controversial and has not created a split in the circuits.[5] In other words, the circuits are in agreement that in the non-scientific context, courts should apply the "relevant and reliable" test, but not the more specific *Daubert* factors. Indeed, the three cases cited by Petitioner as illustrative of the split are completely consistent with each other.

Petitioner cites the Tenth Circuit decision in *Compton* as an example of the misapplication of *Daubert*. Petitioner's Brief at 11. But, a close reading of the decision reveals that the Tenth Circuit would apply *Daubert*'s "relevant and reliable" test to all expert testimony. *Compton*, 82 F.3d at 1513 (citing *Daubert*, 509 U.S. at 589-95) (specifically stating that the trial court *always* has an obligation under Rule 702 "to make a preliminary finding that profferred expert testimony is both *relevant and reliable*") (emphasis added). In addition, *Compton* did not even deal with non-scientific expert testimony. Instead, the opinion dealt with the quasi-scientific expert testimony of an engineer regarding an alternative design in a product liability suit. Indeed, *Compton* is largely responsible for the split in the circuits described above in section I.B.[6]

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5. Petitioner argued below that the *Daubert* factors, which are clearly designed to apply to scientific evidence, should be applied to non-scientific evidence, like Dr. Workman's testimony. Petitioner has not made this argument here, and indeed, only one circuit court case has taken such a position. *See Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995). The Sixth Circuit has apparently already adandoned that position. *See Cook v. American Steamship Co.*, 53 F.3d 733 (6th Cir. 1995) (analyzing non-scientific evidence under *Daubert*, but not applying the four factors).

6. The Ninth Circuit also applies the "relevance and reliability" (Cont'd)

Compton's holding is completely consistent with the two cases Petitioner cites as properly applying *Daubert* to non-scientific experts. Petitioner's Brief at 11. In *Tyus*, the Seventh Circuit addressing the admissibility of an advertising expert's testimony, held:

> Social science testimony . . . must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony "adheres to the same standards of intellectual rigor that are demanded in [her] profession work."

Tyus v. Urban Search Management, 102 F.3d 256, 263 (7th Cir. 1996) (*quoting Braun v. Lorillard, Inc.*, 84 F.3d 230, 234 (7th Cir. 1996)), *cert. denied*, 117 S. Ct. 2409 (1997). The court explained that "*[a]t that level of generality*, the *Daubert* framework is appropriate for all kinds of expert testimony." *Id.* (emphasis added). *See also Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183 (7th Cir. 1993) (holding only that trial judge must " 'ensure that all [expert] testimony or evidence admitted is not only relevant, but reliable.' ").[7]

Although the language employed in the caselaw creates confusion over courts' holdings,[8] a hard look at the circuit court

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(Cont'd)
test to non-scientific evidence. *See McKendall*, 122 F.3d at 807 (the "*Daubert* factors" do not apply to non-scientific expert testimony, but "relevance and reliability" test does).

7. Like *Compton*, the *Smelser* case, also cited by Petitioner, involved a quasi-scientific expert — a biomechanical engineer — and is therefore not applicable here. *Smelser v. Telsmith, Inc.*, 105 F.3d 299 (6th Cir. 1997).

8. For example, the courts often state that *Daubert* does not apply when they actually mean that the "*Daubert* factors" do not (Cont'd)

decisions reveals consistent application of *Daubert*'s "relevant and reliable" test to all expert testimony. There is no split justifying certiorari under Sup. Ct. R. 10(a).

C. Resolution Of Petitioner's Supposed Split Would Not Affect The Outcome Of This Case.

Even if this Court determined that a split exists over whether *Daubert* applies to *non-scientific* expert testimony, resolution of that split would not affect the outcome here. If *Daubert* does not apply to non-scientific expert testimony then the Ninth Circuit would be affirmed. If *Daubert* does apply to non-scientific expert testimony then the district court would still be affirmed because it considered both "relevance and reliability" when it admitted Dr. Workman's testimony.[9]

(Cont'd)

apply. *See Compton*, 82 F.3d at 1519 (stating that "*Daubert* simply has little bearing on [expert's] testimony" after previously stating that the trial court always has a duty to review profferred expert testimony for relevance and reliability). Courts have not carefully distinguished between the general gatekeeper duty to review for relevance and reliability and the more searching duty in the case of novel scientific evidence to apply the four factors in the reliability analysis.

9. The only way the district court could be reversed is if this Court holds that a trial judge must literally apply the *Daubert* factors to non-scientific expert testimony. As has been noted by many commentators, application of the four factors to non-scientific experts is often absurd. *See, e.g.*, Jennifer Laser, The Inconsistent Gatekeeping in Federal Courts: Application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* to Nonscientific Expert Testimony, 30 Loy. L.A. L. Rev. 1379, 1391 (1997); Lisa M. Agrimonti, The Limitations of *Daubert* and Its Misapplication to Quasi-Scientific Experts, A Two Year Case Review of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), 35 Washburn L.J. 134, 144 (1995).

Dr. Workman — a range economist — was uniquely qualified to testify about the appropriate grazing fee. *See* Statement of the Case, Part B (detailing qualifications). Dr. Workman's calculation of the fee was straightforward. He relied on publicly available data published by the Economic Research Service in the United States Department of Agriculture. The Nation complained that Dr. Workman did not investigate the specifics of the underlying leases included in the data. However, as Dr. Workman testified and as the district court accepted, it was unnecessary to determine the specifics of the comparables because the data he used was a statistical average of a large sample of all Arizona grazing leases. This data was especially reliable because it was collected for purposes other than this litigation. *See Daubert v. Merrell Dow Pharmeceuticals, Inc.*, 43 F.3d 1311, 1316-17 (9th Cir.) (on remand) ("that an expert testifies based on research he has conducted independent of litigation provides important, objective proof that the research comports with the dictates of good science"), *cert. denied*, 116 S. Ct. 189 (1995). Dr. Workman's testimony would certainly pass muster under *Daubert*'s reliability test, especially in light of the abuse of discretion standard of review applicable to the district court's decision. *See General Electric Co. v. Joiner*, 118 S. Ct. 512, 516 (1997) (admissibility of expert testimony reviewable under the abuse of discretion standard).

This Court should not accept certiorari because resolution of this split — if it even exists — is not central to the outcome below. As Justice Brennan once said:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution of the [conflict between the circuits] can await a day when the issue is posed less abstractly.

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959).

D. Other Factors Counsel Against Accepting The Writ.

There are two additional reasons this Court should deny review in this case.

First, the district court decisions below were issued in January of 1993 — six months before this Court issued *Daubert*. Thus, the lower court record contains no express analysis of the *Daubert* issue. Moreover, the Ninth Circuit's *Daubert* analysis consists of one sentence:

> The Navajo's reliance on *Daubert* is misplaced because Dr. Workman's testimony derives from his relatively straightforward application of range economics, rather than on novel scientific theory.

This sentence does not hold, as Petitioner suggests, that no aspect of *Daubert* will ever apply to non-scientific expert testimony. Indeed, a review of the Nation's brief on appeal to the Ninth Circuit reveals that the Nation argued that all the *Daubert* factors should apply to Dr. Workman's testimony. The Ninth Circuit was specifically responding to that argument. Regardless of exactly what the Ninth Circuit meant, the fact remains that the analysis of *Daubert* was cursory. As a prudential matter, review of these important issues of evidence law should await a case with a fully developed record below.

Second, this case involved a bench trial, not a jury trial. Thus, *Daubert*'s prevailing concern that jurors' lack of knowledge and training impedes their ability to assess scientific expert testimony on its merits and causes them to give the testimony too much weight is not implicated *See Daubert*, 509 U.S. at 595 ("[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it").

II.

WHETHER IT IS EQUITABLE TO PERMIT THE TRIBE TO RECOVER DAMAGES FOR LOST GRAZING OPPORTUNITIES ON THE HPL IS AN EXCEPTIONALLY NARROW ISSUE AND DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW.

The Nation argues that the Tribe should not recover damages for lost grazing opportunities on lands which the Tribe, after partition, decided to reserve for forests and wildlife rather than for livestock (the "vacant ranges"). The Nation claims such a recovery is inconsistent with the "principles of equity" found in the 1974 Act. But, the Nation fails to explain that the Ninth Circuit's decision was based the straightforward application of the Restatement (Second) of Torts.

The Ninth Circuit relied on comment b to § 931, which provides in pertinent part:

> The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least rental value of the . . . land during the period of deprivation. *This is true even though the owner in fact has suffered no harm through the deprivation, as when he was not using the subject matter at the time . . . .*

Restatement (Second) of Torts § 931 cmt. b (emphasis added). The Ninth Circuit correctly held that the Tribe could recover damages for the vacant ranges because "an owner can suffer deprivation even if the owner 'was not using the subject matter at the time.' " *Masayesva*, 118 F.3d at 1384; App. 27.[10]

10. Pursuant to Sup. Ct. R. 15.2, the Tribe points out that the (Cont'd)

The Nation does not argue that the Ninth Circuit applied the wrong legal standard. Instead, it merely claims that in this particular case, the application of that standard is inequitable and unfair. Whether the application of comment b to section 931 of the Restatement (Second) of Torts is equitable on these particular facts is a narrow issue indeed. As such, the Nation has failed to present an important question of federal law. Sup. Ct. R. 10(c).

The Nation raises a third argument in its petition regarding the liability of the United States. The Tribe has settled with the United States and does not take a position on that issue.

(Cont'd)
Nation misquotes the Ninth Circuit opinion at page 16 of its petition. The Nation states that the Ninth Circuit held that " 'the Hopi should be awarded damages for lost grazing opportunity on the vacant ranges . . . even though the owner [Hopi] in fact suffered no harm through the deprivation.' " The Nation actually combined the Ninth Circuit's holding with a sentence from the Restatement. *See Masayesva*, 118 F.3d at 1384; App. 26-27.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

TIMOTHY G. ATKESON
Counsel of Record
DAPHNE WERTH
ARNOLD & PORTER
Attorneys for Respondent
The Hopi Tribe
Suite 4000
1700 Lincoln Street
Denver Colorado 80203
(303) 863-1000